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No. 836

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

W.M.C.A., Inc., R. PETER STRAUS, JOSEPH DE MAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

Appellants,

v.

CAROLINE K. SIMON, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, ABE STARK, President of the City Council of the City of New York, A. HOLLY PATTERSON, Chairman, Board of Supervisors, Nassau County, OWEN M. QUINN, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Jurisdictional Statement

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Jurisdictional Statement

Opinion Below

The opinion of the three-judge district court dismissing the complaint has not been reported. A copy thereof is set forth in Appendix A, *infra*, pp. 1a-28a. The prior opinion denying a motion to dismiss the complaint without convening a three-judge court is reported at 196 F. Supp. 758.

Jurisdiction

On January 11, 1962, the three-judge statutory court entered an order and judgment dismissing the complaint

which had sought to enjoin various state officials from performing functions in connection with state constitutional and statutory provisions alleged to be in violation of the Fourteenth Amendment to the Constitution of the United States. A notice of appeal to this Court was filed in the district court on February 5, 1962 (R. 297-302). Jurisdiction of this Court to review on direct appeal the decision of the district court dismissing the complaint is conferred by 28 U.S.C. 1253.

Question Presented

Whether the district court erred in dismissing, without a trial on the merits, a complaint which alleged that appellants were deprived of rights protected by the Fourteenth Amendment by virtue of a formula, embodied in the State constitution and implemented by statute, which apportioned the State Senate and Assembly in a manner which grossly discriminated against the more populous areas in which appellants reside, where:

(1) the complaint alleged that the apportionment formula was consciously designed to discriminate against appellants and others similarly situated, and is the result of affirmative legislative action.

(2) the complaint alleged that as a result of the aforesaid malapportionment, the legislature consciously and systematically discriminates against appellants and others similarly situated.

United States Constitution, Federal Statutes and State Constitution and Statutes Involved

The pertinent provisions of the United States Constitution; 42 U.S.C., Sections 1983 and 1988; 28 U.S.C., Sec-

tions 1343(3); 2201 and 2202; Art. III, Sections 1-5 of the Constitution of the State of New York; and State Law, Sections 120-123, are set forth in Appendix B, *infra*, pp. 1b-58b.

Statement

a) The Complaint

This action was brought under the Civil Rights Act, U.S.C., Title 42, §§ 1983 and 1988, and under U.S.C., Title 28, § 1343. The individual appellants are citizens and voters residing in the counties of New York, Bronx, Kings, Queens, Suffolk and Nassau. The appellant W.M.C.A., Inc. is a New York corporation and a taxpayer having its principal place of business in New York County. The suit is a class action brought on behalf of the named appellants and all other persons, citizens, taxpayers and voters similarly situated.

The appellees are: the Secretary of State and Attorney General of the State of New York; the Commissioners of the Board of Elections of the City of New York; and the Chairman of the Board of Supervisors of Nassau, Westchester and Suffolk Counties and the President of the City Council of the City of New York.[1] The complaint alleged that all of the appellees perform or will be required to perform official functions arising out of the legislative apportionment of the State and the conduct of elections pursuant to such apportionment.

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1. Although nominally appellees, the officials representing the City of New York filed an answer (R. 41-42) admitting the allegations of the complaint and associated themselves with the appellants in this action.

The complaint alleged that the appellants are denied due process and equal protection of the law as guaranteed to them by the Fourteenth Amendment of the Constitution of the United States, by virtue of the provisions of the New York State Constitution and the statutes in implementation thereof which provide for an apportionment of the State Senate and Assembly[2] in a manner which is invidiously discriminatory to the residents of the more populous areas of the State.

The complaint contained two causes of action, the first of which alleged (R. 2-14) that the formula contained in the State Constitution (Art. III, §§ 2-5) currently results in an apportionment which deprives appellants of rights guaranteed by the Fourteenth Amendment. The second cause of action (R. 14-15) alleged that those provisions of the State Constitution were invalid and violative of the Fourteenth Amendment at the time of their adoption and that their adoption and the enactment in 1953 of statutes (State Law, §§ 121 and 123) apportioning the legislature pursuant to said provisions constituted "affirmative legislative action" which deprived appellants of rights guaranteed by the Fourteenth Amendment.

As examples of the results of the apportionment formula, the complaint cited (R. 10) the fact that "whereas one Senator represents approximately 299,000 citizens in New York County * * * one Senator represents substantially fewer citizens, in some instances almost as few as half as many citizens in upstate counties. * * * One

2. Challenge was directed only to the apportionment of the state legislature and not to questions relating to Congressional districting. Matters concerning apportionment of state legislatures and those concerning Congressional districting are interrelated only in that the Congressional districts are determined by the state legislatures which, by virtue of malapportionment, may not be truly representative of their states.

Assemblyman represents 17,461 citizens of Yates County; one Assemblyman represents approximately 115,000 citizens in Bronx County".

The relief sought by the complaint was that the district court declare, pursuant to U.S.C., Title 28, § 2201, that Article III, §§ 2-5, of the Constitution of the State of New York, and State Law, §§ 121 and 123, are void and invalid as being contrary to the Fourteenth Amendment of the Constitution of the United States; that the appellees be restrained from acting pursuant to said provisions, and that the court retain jurisdiction of the case until the state legislature provides for such apportionment of the state as would insure to the appellants the rights guaranteed them by the Fourteenth Amendment.

b) The Opinion Below

The three-judge district court granted appellees' motion, brought pursuant to Rule 12, F.R.C.P., to dismiss the complaint. Three separate opinions were filed. Writing the principal opinion of the court, Richard H. Levet, District Judge, held that, although the court had jurisdiction over the subject matter, the complaint failed to state a claim upon which relief can be granted since the Fourteenth Amendment affords no protection against discrimination by a state with respect to voting so long as the provisions of the Fifteenth and Nineteenth Amendments are not violated. Judge Levet also held that the complaint should be dismissed for "want of justiciability", placing emphasis upon the fact that the apportionment formula was set forth in the state constitution.

Circuit Judge Sterry Waterman, concurring, was of the opinion that the court should "follow the majority result

in *Colegrove* v. *Green*" and express no opinion "whether the present legislative apportionment in the State of New York violates the Fourteenth Amendment to the United States Constitution." (Appendix A, *infra*, p. 27a)

The third member of the court, Chief District Judge Sylvester J. Ryan, agreed with Judge Levet that the court had jurisdiction to entertain the suit but concurred in the dismissal because, as he saw it:

> "Judicial interference by federal courts with the power of a state to create internal political or geographical boundaries affecting the rights of suffrage cannot be supported by mere territorial discrimination and nothing more." (Appendix A, *infra*, p. 28a)

The Question Presented is Substantial

The question presented is substantial because the complaint dismissed below raises similar issues, and in many respects is identical to the complaint which this Court held in *Baker* v. *Carr*, No. 6, October Term, 1961, decided on March 26, 1962, presented "a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision." Slip Opinion, Page 49. The complaint in this action proceeds upon the same jurisdictional bases, has equivalent parties plaintiff and defendant, and is in essentially the same procedural posture as was the complaint before the Court in the *Baker* case. The action of the lower court in holding that this complaint fails to state a claim upon which relief can be granted was, of course, rendered without the benefit of this Court's decision in *Baker* v. *Carr*.[1] The decision below is clearly contrary to

1. On the motion to dismiss the complaint without convening a three-judge court, the district judge denied an application to hold the motion in abeyance pending a decision by this Court in the *Baker* case (R. 141-143).

the holding in the *Baker* case and unless the lower court's holding is set aside, it will create considerable confusion as to the scope and import of the *Baker* case.

The court below held that there was jurisdiction over the subject matter, but dismissed the complaint as being insufficient because, in the opinion of two members of the court, the Fourteenth Amendment did not inhibit the power of a state to discriminate against residents of urban areas with respect to voting rights, so long as there is no discrimination on the grounds of race, religion or sex. The point need not be labored that this conclusion is contrary to the holding in *Baker*, where this Court held with respect to an almost identical complaint that "The right asserted is within the reach of judicial protection under the Fourteenth Amendment." Slip Opinion, Page 49.

Judge Levet also gave as grounds for the dismissal of the complaint "want of equity and justiciability." (App. A, *infra*, p. 24a) Judge Levet reached the conclusion, that the complaint was so lacking, on the basis solely of its allegations, without benefit of answers having been filed by those appellees who resisted the action, and prior to any hearing on the merits. It was Judge Levet's opinion that the inclusion of the challenged apportionment provisions in the state constitution somehow rendered those provisions immune from a challenge such as that posed in this action. Judge Levet sought to distinguish this case from the *Baker* case, on the grounds that the Tennessee case would turn on whether "* * * Tennessee voters under federal constitutional provisions have a right to federal enforcement of the Tennessee State Constitutional apportionment provisions * * *" (App. A., *infra*, p. 25a). However, in the subsequently announced decision of this Court in *Baker*, any reliance upon the Tennessee State Constitu-

tion as a basis for holding that the complaint stated a justiciable cause of action, was explicitly disclaimed.[2]

We respectfully submit that, from the standpoint of the federal constitution, it is irrelevant whether the discrimination is primarily a result of designed legislative inaction contrary to the state constitution, as in *Baker*, or of affirmative action which takes the form of enactment of constitutional provisions and statutes implementing those provisions, as in this case. Cf. *Giles* v. *Harris*, 189 U. S. 475; *Pierce* v. *Society of Sisters*, 268 U. S. 510. See also, *Gibson* v. *Board of Public Instruction*, 170 F. Supp. 454, 456 (S.D. Fla.) (1958). Clearly, if a state acts in a manner which violates rights guaranteed by the Fourteenth Amendment, it is no defense to assert that the state has violated such rights with the solemnity and majesty of a constitutional provision. *Cooper* v. *Aaron*, 358 U. S. 1, 18.

Neither the fact that the state constitution was adopted in 1894 by referendum of the voters, nor the fact that proposals to revise and amend the Constitution or to call a constitutional convention have been defeated by the voters, vitiate appellants' claims; and certainly these facts provide, at best, matters of defense to be raised after answer and on a trial on the merits, and do not furnish a basis for a summary dismissal of the action.

In fact, and as alleged in the complaint (Par. 20, R. 13-14), appellants have no adequate political remedy and the presence of the challenged provisions in the State Constitution cannot be interpreted as being a true reflec-

2. See *Baker* v. *Carr*, Slip Opinion, Page 6, Footnote 15: "* * * Since we hold that appellants have—if it develops at trial that the facts support the allegations—a cognizable federal constitutional cause of action resting in no degree on rights guaranteed or putatively guaranteed by the Tennessee Constitution, we do not consider, let alone enforce, rights under a State Constitution which go further than the protections of the Fourteenth Amendment."

tion of the wishes of the majority of the voters of New York State. In New York, as in Tennessee, the only possible source of relief must lie with the federal courts[3] for no solution to this problem can be expected from voluntary action of the Legislature which is, itself, a product of the malapportionment. New York State is designedly malapportioned so that a minority of the citizens elect a majority of the State Legislature and it is impossible for the majority to acquire an equitable voice in the Legislature, which is the only body that can initiate amendments to the apportionment provisions.[4] The people of New York do not have the right to amend their constitution by initiative and referendum. A constitutional convention cannot remedy the problem, for such a convention cannot be convened prior to 1978. Moreover, except for fifteen delegates-at-large, all of the delegates to such constitutional convention would be elected by Senate districts and would therefore reflect the present unequitable apportionment of this State. For these reasons, the reliance which Judge Levet placed (App. A, *infra*, pp. 24a-25a) upon the fact that voters had defeated proposals for constitutional conventions was misplaced, and these facts furnish no basis for a holding that the complaint, on its face, is wanting in equity or justiciability.

Moreover, it would be futile to refer appellants for redress to a political remedy since the very evil complained of in this action renders that political remedy

3. The New York State courts will not consider challenges to the fairness of an apportionment on grounds other than non-compliance with the State Constitution. *Burns* v. *Flynn*, 268 N. Y. 601 (1935).

4. No real opportunity since 1894 has been given by the legislature to the voters to remedy the existing inequities.

ineffective. In *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, footnote 4, the question was raised:

> "* * * 'whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation' * * *"

Here, not only does malapportionment deprive appellants of equitable political representation with regard to all matters in which the interests of rural and urban residents conflict, so that there is not in New York "government by the consent of the governed," but the malapportionment itself is (as it was intended to be) self-perpetuating unless judicial relief is available. It must, therefore, be subject to "exacting judicial scrutiny."

With respect to the question whether this Court's decision in *Baker* v. *Carr* is applicable in those cases where the challenged apportionment provisions are contained in the constitution of the state, attention is respectfully directed to the case of *Scholle* v. *Secretary of State*, No. 22, October Term, 1961, pending on Jurisdictional Statement. Although in many respects the instant case presents a more compelling need for judicial intervention[5] the cases are similar in that both challenge, under the Fourteenth Amendment, provisions of state constitutions

5. Whereas, in New York, appellants have no remedy other than the relief which this Court can grant (see *supra*), the Michigan Constitution, unlike the New York Constitution, provides for amendment by initiative and referendum and the challenged provisions became part of the Michigan Constitution through initiative and referendum. Furthermore, in the *Scholle* case complaint was made only of the Senate apportionment whereas, here, the malapportionment complained of affects both houses of the Legislature. (Complaint, paragraph 14, R. 10.)

relating to apportionment. If this Court should see fit to reverse the decision below in *Scholle* v. *Secretary of State* and remand that case for reconsideration in the light of *Baker* v. *Carr*, we respectfully suggest that a similar procedure would seem appropriate here.

The holding below is contrary not only to the decision in *Baker*, but is also inconsistent with and seeks unduly to restrict the scope of *Gomillion* v. *Lightfoot*, 364 U. S. 339.

Recognizing that *Gomillion* was decided under the Fifteenth, not the Fourteenth Amendment, we nevertheless believe it to stand for the proposition that a compelling case for judicial intervention is presented where the political ineffectiveness of group results from the affirmative discriminatory acts the state legislature. The malapportionment of New York is the result of just such affirmative discriminatory action.

The legislative history of the constitutional provisions challenged here fully supports the allegations of the complaint that the malapportionment was the result of a designed discrimination against residents of New York City. The records of the Constitutional Convention of 1894 are replete with assertions that the residents of New York were "unfit," of inferior intelligence, subject to foreign political subversion, and otherwise not entitled to fair or proportionate representation in the Legislature.[6] In any event, the allegation of a conscious intent to discriminate manifested in affirmative legislative action was deemed to be admitted for purposes of the motion to dismiss.

This case differs from *Gomillion* in two respects, neither of which is crucial. First, in *Gomillion*, the class discriminated against were Negroes residing in particular sections

6. See Appendix C, *infra*, in which excerpts from the Constitutional Convention of 1894 are set forth.

of the city. Here, the persons discriminated against are urban residents and although, as we have seen, aspersions were cast as to the intellect and integrity of the city population, no allegation or claim is made of racial discrimination. Thus, the issue presented is whether the Constitution protects against all invidious discrimination by a state with regard to voting, not merely against racial discrimination. We submit that it would be ironic if appellants' rights to a vote fairly cast and fairly counted could be violated with impunity merely because they were not Negroes.

Secondly, whereas in *Gomillion* protest was made in the courts immediately after the "affirmative legislative action," here the basic discriminatory provision is that contained in the Constitution itself as enacted in 1894. However, the Legislature implements this provision by periodically enacting statutes reapportioning the State pursuant to the constitutional formula and these re-enactments (the most recent being in 1953) constitute further "affirmative legislative action." Finally, it can hardly be contended after *Brown* v. *Board of Education*, 347 U. S. 483 that a violation of constitutional rights becomes sanctified merely because of the passage of time during which time corrective efforts have been to no avail. Cf. *Fairbank* v. *United States*, 181 U. S. 283. If the only defense to discrimination as flagrant and pernicious as that complained of in this action is that the discrimination is of long standing, that defense must be summarily rejected. Certainly a defense based on "custom" is, at best, "a defense" and not a ground for dismissal of a complaint.

The court below dismissed the complaint, before a trial on the merits, without questioning whether the malapportionment in fact exists in New York to the extent

alleged in the complaint. Of course, for the purposes of the motion to dismiss, the allegations of the complaint, including the allegations as to the scope and extent of the malapportionment and the manner in which it operated to the prejudice of the appellants, are deemed to have been admitted. In any event, however, the existence of such malapportionment in New York State and its detrimental consequence to the residents of the urban areas can hardly be questioned.[7] It is to this Court which appellants must now look as the sole possible source of redress for the deprivation of rights fundamental to a democratic society.

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7. Appellants submitted, in support of their motion to convene a three-judge court, a detailed analysis, based upon current census figures, of the manner in which the challenged provisions discriminate against urban residents. (Affidavit of Professor Ruth C. Silva, R. 88-92). This material was resubmitted to the three-judge court, but Judge Levet, in dismissing the complaint, stated that he had "not considered the affidavits separately submitted by the plaintiffs, since I have concluded that the motion may be determined upon the complaint (including exhibits attached) alone." (Appendix A, *infra*, p. 24a). The substance of Professor Silva's affidavit has since been published in the American Political Science Review, Vol. LV, No. 4, December, 1961, pp. 870-881 under the title, "Apportionment of the New York State Legislature" and 40 reprints thereof have been lodged with the Clerk together with this Jurisdictional Statement.

CONCLUSION

It is submitted that the Court has jurisdiction and should hear this appeal, or, in its discretion, should reverse the decision below and remand the case for reconsideration in the light of Baker *v.* Carr.

Respectfully submitted,

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March 30, 1962.

APPENDIX A

[261] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

16 CIV. 1559

W.M.C.A., ET AL.,

Plaintiffs,

against

CAROLINE K. SIMON, ET AL.,

Defendants.

OPINION

[262] Before: WATERMAN, Circuit Judge
RYAN and LEVET, District Judges.

LEVET, D.J.

[263] This matter came before this court pursuant to Title 28 USCA § 2284 as a result of the determination by the district court by opinion dated July 7, 1961 and order made pursuant thereto. See WMCA Inc. *v.* Simon, D.C.S.D. N.Y., 1961, 196 F. Supp. 758.

Before this statutory three-judge court, motions have been renewed by defendants Caroline K. Simon, Secretary of State of the State of New York, Louis J. Lefkowitz, Attorney General of the State of New York, A. Holly Patterson, Chairman, Board of Supervisors, Nassau County, Owen M. Quinn, Chairman, Board of Supervisors, Westchester County, William J. Leonard, Chairman, Board of Supervisors, Suffolk County, to dismiss the

complaint in this action under Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that (1) the court lacks jurisdiction over the subject matter and (2) the complaint fails to state a claim upon which relief can be granted.

The New York City defendants, to wit, Abe Stark, President of the City Council of the City of New York, Denis J. Mahon, James Powers, John R. Crews, Thomas Mallee, Commissioners, Board of Elections, New York City, have answered the complaint, admitting the allegations thereof and in effect asking for the relief sought by the plaintiffs. Consequently, they have opposed the aforesaid motion.

[264] THE COMPLAINT

Plaintiffs in their various alleged capacities as taxpayers, citizens and voters seek (1) a declaratory judgment pursuant to 28 USCA §§ 2201 and 2202 that New York's constitutional and statutory provisions governing apportionment of State, Senate and Assembly Districts (New York State Constitution, Art. III, §§ 2-5; New York State Law §§ 121, 123) are unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment of the United States; and (2) an injunction to restrain the New York Attorney General and Secretary of State, as well as the above-mentioned county and municipal officials, from performing their required functions under the challenged laws.

Jurisdiction was asserted under the Civil Rights Act, 42 USCA §§ 1983, 1988, and 28 USCA § 1343(3). Plaintiffs sought the convening of a three-judge court, pursuant to 28 USCA § 2281, insofar as an injunction is requested restraining enforcement or execution of a state statute and constitution.

Except for W.M.C.A. Inc., a New York corporation, characterized in the complaint as a "taxpayer" (par. 3 of complaint), plaintiffs are all individuals described as "citizens," "taxpayers," and "qualified voters" (par. 4 of complaint) from four of the five counties of New York City (none from Richmond County) and the Counties of Nassau and Suffolk. [265] One of the plaintiffs, R. Peter Straus, further alleges that he is president of the corporate plaintiff, W.M.C.A. Inc. (par. 4[a] of complaint).

Plaintiffs ask the court to declare Art. III, §§ 2-5 of the New York State Constitution violative of the due process and equal protection of the laws provision of the Fourteenth Amendment of the Constitution of the United States upon the ground that:

> "• • • the apportionment formula contained therein results, and must necessarily result, when applied to the population figures of the State in a grossly unfair weighting of both houses in the State legislature in favor of the lesser populated rural areas of the state to the great disadvantage of the densely populated urban centers of the state." (par. 12 of complaint)

The complaint specifically cites as the cause of this allegedly unconstitutional distribution of state legislative representation the New York Constitutional provisions requiring that:

> (a) "• • • the total of fifty Senators established by the Constitution of 1894 shall be increased by those Senators to which any of the larger counties become entitled in addition to their allotment as of 1894, but without effect for decreases in other large counties • • •"

(b) no county may have "four or more Senators unless it has a full ratio for each Senator * * *" and

(c) "* * * every county except Hamilton shall always be entitled [in the Assembly] to one member coupled with the limitation of the entire membership to 150 members * * *" (par. 13 of complaint.)

[266] Plaintiffs further allege that they have been subjected to "taxation without adequate representation" (par. 18 of complaint) and that the prevailing New York apportionment formula is "contrary to the prevailing philosophy of government in the United States and all Anglo-Saxon jurisdictions." (Complaint, par. 17)

The district court was therefore requested to convene a three-judge court to declare New York State Constitution, Art. III, §§ 2-5, unconstitutional and void; to restrain the Secretary of State from printing, mailing or otherwise distributing any election materials, to restrain the Attorney General from enforcing said constitutional and statutory provisions, and the aforementioned municipal and county officials from taking any action under such existing laws (complaint, pp. 15-16). Before the district judge, the defendants moved to dismiss the complaint for lack of jurisdiction over the subject matter and failure to state a claim upon which relief could be granted. The district judge in convening this three-judge court denied the motion to dismiss without prejudice to the right of the defendants to renew such motion before the three-judge statutory court. WMCA Inc. *v.* Simon, D.C.S.D. N. Y., 1961, 196 F. Supp. 758. This court is further asked "to retain jurisdiction of this cause until such time as the legislature of the State * * * provides for such apportion-

ment of the State legislature as will insure to the urban voters of New York State the rights guaranteed them by the Constitution of the United States." (Complaint, par. 17)

[267] JURISDICTION

"Jurisdiction * * * is the power to consider and decide one way or the other, as the law may require, and is not to be declined merely because it is not foreseen with certainty that the outcome will help plaintiff." Geneva Furniture Co. *v.* Karpen, 1915, 238 U. S. 254. "Jurisdiction" connotes the power to decide a case on its merits. Kibler v. Transcontinental & Western Air, D.C.E.D. N.Y., 1945, 63 F. Supp. 724.

Even before the case of Gomillion *v.* Lightfoot, 1960, 364 U. S. 339, the United States Supreme Court never held that the federal courts were without jurisdiction over matters concerning legislative apportionment involving either Congressional or state legislative apportioaments. Rather, it appears that the court has seen fit in specific instances to decline to exercise its equity power in that area.

Defendants in opposing jurisdiction herein rely on the determination in Colegrove *v.* Green, 1946, 328 U. S. 549, rehearing denied 1946, 329 U. S. 825, 828. It is argued that the Colegrove case decided that there was no jurisdiction in the federal courts in *suits involving apportionment*. An examination of the opinion will reveal that this interpretation is incorrect. In Colegrove, the plaintiff complained that the state legislature had failed to reapportion the Illinois *Congressional* Districts for some forty years and that inequality of voting power [268] resulted. The statutory court concluded that it was bound by the

decision in Wood *v.* Broom, 1932, 287 U. S. 1[1] and, accordingly, dismissed the suit.

In the United States Supreme Court in Colegrove *v.* Green, supra, only seven justices participated. Chief Justice Stone heard the argument, but died before the decision. Mr. Justice Jackson took no part in the consideration or decision of this case. Mr. Justice Frankfurter wrote the opinion of the court, in which Mr. Justice Reed and Mr. Justice Burton concurred. Mr. Justice Black dissented in an opinion in which Mr. Justice Douglas and Mr. Justice Murphy joined. This dissent, among other things, stated that (1) that Wood *v.* Broom, 287 U. S. 1 did not preclude granting equitable relief in this case (Colegrove); and (2) that jurisdiction existed.

[269] An examination of the Frankfurter opinion, which affirmed the statutory court's dismissal of the complaint, reveals that Mr. Justice Frankfurter's position was, among other factors, based upon (1) a dismissal for *want of equity* (p. 533); and (2) the fact that the authority for dealing with the problems involved resided with Congress (p. 554). It was, I believe, solely to sustain the policy of Congressional control and the *consequent* lack of wisdom of court interference that he used such phrases as:

> "The one stark fact that emerges from a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests. * * *" (p. 554)
>
> "* * * Courts ought not to enter this political thicket. * * *" (p. 556)

1. In Wood v. Broom, 1932, 287 U. S. 1, the court held that the Reapportionment Act of 1911, requiring that Congressional election districts be of contiguous and compact territory and as nearly as practicable of equal population, applied only to districts formed under that Act and not to the Apportionment Act of 1929.

Mr. Justice Rutledge, making up the fourth of the prevailing justices, concurred in a separate opinion. Referring to Wood *v.* Broom, 287 U. S. 1, he wrote in part:

> "* * * [As] the Court's opinion [i.e., in Wood] notes, four justices thought the bill should be dismissed for want of equity.
>
> "In my judgment this complaint [Colegrove *v.* Green] should be dismissed for the same reason. Assuming that the controversy is justiciable, I think the cause is of so delicate a character, in view of the consideration above noted, that the jurisdiction should be exercised only in the most compelling circumstances.
>
> * * *
>
> "The right here is not absolute. And the cure sought may be worse than the disease.
>
> [270] "I think, therefore, the case is one in which the Court may properly, and should, decline to exercise its jurisdiction. Accordingly, the judgment should be affirmed and I join in that disposition of the cause." (pp. 565-566)

Thus, at least four justices out of seven in Colegrove v. Green clearly concluded that jurisdiction existed but that the complaint should be dismissed for *want of equity*. It may be questioned whether the Frankfurter opinion itself holds otherwise since in 1960 in his opinion in Gomillion v. Lightfoot, 364 U. S. 339, 346, in referring to Colegrove v. Green, he wrote:

> "* * * The Court affirmed the dismissal of the complaint on the ground that it presented a subject not meet for adjudication.* * * *"

"* [Note] Soon after the decision in the Colegrove case, Governor Dwight H. Green of Illinois in his 1947 biennial message to the legislature recommended a reapportionment. The legislature immediately responded. Ill. Sess. Laws 1947, p. 879, and in 1951 redistricted again. Ill. Sess. Laws 1951, p. 1924."

The per curiam opinion in South v. Peters, 1950, 339 U. S. 276, 277, involving a county unit system, did not state that an affirmance of a dismissal was based on lack of jurisdiction. Instead, the words are:

> "* * * We affirm. *Federal courts consist alla refuse to exercise their equita powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions.* See MacDougall *v.* Green, 335 U. S. 281 (1948); Colegrove *v.* Green, 328 U. S. 549 (1946); Wood *v.* Broom, 287 U. S. 1, 8 (1932); cf. Johnson *v.* Stevenson, 170 F. 2d 108 (C. A. 5th Cir., 1948)." (Emphasis added.)

[271] See also opinions of Mr. Justice Rutledge in Cook v. Fortson, 1946, 329 U. S. 675, and in MacDougall v. Green, 1948, 335 U. S. 281, 287. Also see observations of Mr. Justice Cavanaugh of the Supreme Court of Michigan regarding Colegrove v. Green in Scholle v. Hare, 1960, 360 Mich. 1, 104 N. W. 2d 63, 70-71.

As Mr. Justice Rutledge pointed out in two footnotes to his opinion in Colegrove, 328 U. S. 549, at pages 565 and 566:

> "Want of equity jurisdiction does not go to the power of a court in the same manner as want of jurisdiction over the subject matter. * * *
>
> "'The power of a court of equity to act is a discretionary one. * * * Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only "to prevent irreparable injury which is clear and imminent."' American Federation of Labor *v.* Watson, 327 U. S. 582, 593, and cases cited."

It is perhaps not amiss to state that the following justices of the Supreme Court in one or more apportion-

ment cases have outrightly [272] held that jurisdiction was present: Brandeis,[1] Stone,[1] Roberts,[1] Cardozo,[1] Rutledge,[2,3,4] Black,[2,3,4,5,6,7,8] Douglas,[2,4,5,6,8] and Murphy.[2,3,4,5]

In Radford v. Gary, D.C.W.D. Oklahoma, 1956, 145 F. Supp. 541, 545-546, aff'd 1957, 352 U. S. 991, in a dissenting opinion, Wallace, District Judge, pointed out the limitations of the United States Supreme Court decision in Colegrove v. Green, as follows:

> "* * * [A] careful reading of the majority opinion makes it amply clear that the Supreme Court was primarily concerned with faithfully adhering to the separation of powers doctrine, and desired to defer to the Congress, a co-equal branch of the federal government, to deal with the matter of congressional districting. A complete remedy lay within the control of another branch of the federal government, and inasmuch as Congress possessed the basic right to pass upon the qualifications of its own members, the Federal Judiciary was not going to become embroiled in such controversy. * * *"

[273] In *Dyer* v. *Kazuhisa Abe D.C.D. Hawaii*, 1956, 138 F. Supp. 220, 233-234, McLaughlin, Chief Judge, wrote:

> "* * * Colegrove *v.* Green definitely decided that a case involving voting districts was a judiciable question over which a federal court had jurisdic-

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1. Broom v. Wood, 287 U. S. 1.
2. Colegrove v. Green, 328 U. S. 549.
3. Cook v. Fortson and Turman v. Duckworth, 329 U. S. 675.
4. Colegrove v. Barrett, 330 U. S. 804.
5. MacDougall v. Green, 335 U. S. 281.
6. South v. Peters, 339 U. S. 276.
7. Remmey v. Smith, 342 U. S. 916.
8. Anderson v. Jordan, 343 U. S. 912.

> tion. Three justices held the court lacked jurisdiction or should not exercise what jurisdiction it had. Three justices felt jurisdiction existed and should be exercised. The deciding vote was cast by Mr. Justice Rutledge. He stated jurisdiction was present, but should not be exercised. Thus *a majority held that a justiciable question was before it, but that in the discretion of the court, equitable jurisdiction should not be exercised.*" (Emphasis added.)

Moreover, as Solicitor General Cox states on page 13 in the brief for the United States as amicus curiae submitted in *Baker* v. *Carr* before the Supreme Court:

> "3. In any event, the plurality opinion in Colegrove *v.* Green, concerning state malapportionment of Representatives, should not be implied to the significantly different problem of state legislative malapportionment. That opinion stated that Article I, Section 4, of the Constitution gives exclusive authority to Congress to secure fair congressional apportionment. But neither that section nor any other part of the Constitution gives Congress such exclusive power with regard to representation in state legislatures." (Brief No. 103.)

Subsequent to *Colegrove* v. *Green*, *supra*, the United States in *Colegrove* v. *Barrett*, 1946, 330 U. S. 804, in a *per curiam* decision stated:

> "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. * * *"

[274] In a number of cases in which state legislative apportionments have been subjected to attack, the statutory courts or district courts definitely assumed jurisdiction to determine the constitutionality of such state enactments.

In *MacDougall* v. *Green*, D.C.N.D. Ill., E.D., 1948, 80 F. Supp. 725, aff'd 1948, 335 U. S. 281, the statutory court considered the complaint, filed Findings of Fact and Conclusions of Law relative to the issues of the constitutionality of state nominating petition requirements, and held that the provisions were not repugnant or violative of any provision of the United States Constitution.

In *South* v. *Peters*, D.C.N.D. Ga., 1950, 89 F. Supp. 672, aff'd 1950, 339 U. S. 276, the statutory court held a trial at which evidence was presented and made and filed Findings of Fact and Conclusions of Law determining that there was no constitutional violation.

In *Remmey* v. *Smith*, D.C.E.D. Pa., 1951, 102 F. Supp. 708, aff'd 1952, 342 U. S. 916, a statutory court, in a matter involving the Pennsylvania Apportionment Act, declined to act upon the ground that the suit was prematurely brought, did not dismiss because of lack of jurisdiction but for want of equity.

[275] In *Magraw* v. *Donovan*, D.C.D. Minn., 1958, 159 F. Supp. 901, Devitt, District Judge, held that the question of the invalidity of a Minnesota legislative redistricting act was within the jurisdiction of the court. It should also be noted that although the three-judge court, when convened, deferred action pending legislative adjustment, that court retained jurisdiction of the case. Magraw *v.* Donovan, D.C.D. Minn., 1958, 163 F. Supp. 184, 188.

The Supreme Court "has never held that apportionment cases necessarily raise non-justiciable questions." As Solicitor General Cox points out in the brief for the United States as amicus curiae in Baker *v.* Carr at page 24:

> "• • • On the contrary, it has passed on the merits of apportionment systems in several cases and has granted relief in some of them. Thus, in

Smiley *v.* Holm, 285 U. S. 355, the Court held that the existing Minnesota apportionment of United States Representatives did not meet federal requirements because the governor had refused to approve the bill, and accordingly, the Court ordered an election-at-large. The Court also held a state apportionment law invalid (the governor had vetoed it) and ordered an election-at-large in Carroll *v.* Becker, 285 U. S. 380. And in Koenig *v.* Flynn, 285 U. S. 375, the Court affirmed a decision of a state court holding that, in the absence of a valid districting statute (the governor had not approved the resolution of the state legislature) to conform to the increase in Representatives allotted to a state by Congress, the additional Representatives must be elected at large." (Brief No. 163)

[276] The recent decision in Gomillion *v.* Lightfoot, 1960, 364 U. S. 339, involved a clear-cut assumption of jurisdiction in *state* apportionment case. While this determination was based upon the Fifteenth Amendment, a reasonable inference is that the court intended to indicate that it would *test* the validity of *state* apportionment by any applicable federal constitutional provision. The step assumed by the court is to *consider*. This does not depend upon whether equitable intervention eventually ensures or upon the result reached on the merits after jurisdiction is entertained.

The recent action of the Supreme Court in granting reargument in the October 1961 Term of the case of Baker *v.* Carr, 1961, 366 U. S. 907, involving a Tennessee state legislative apportionment, indicates an apparent continuation of this policy. (For the decision below in Baker *v.* Carr, see 175 F. Supp. 649 and 179 F. Supp. 824.) Baker *v.* Carr concerns the failure of a state legislature to comply with a state constitutional requirement and, hence, the

questions involved are not equivalent to the issues in the case at bar. There, the petitioners *seek enforcement* of a state provision; here, the plaintiffs *seek to bar enforcement*.

In the Solicitor General's amicus curiae brief (pp. 32-33), heretofore mentioned, he comments pertinently on the Civil Rights Acts of 1957 and 1960, as follows:

> [277] "The enactment by Congress, since the Colegrove decision, of the Civil Rights Acts of 1957 and 1960, 71 Stat. 637, 74 Stat. 86, also affects the reliance in the plurality opinion on the exclusively political nature of the election process. The 1957 Civil Rights Act included a provision expressly conferring jurisdiction upon the federal district courts of actions 'to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote*.' 28 U. S. C. 1343(4) (emphasis added). Congress thereby made clear that, in its view, questions involving 'political' rights, 'including the right to vote,' were 'meet for judicial determination.' Cf. Colegrove v. Green, supra, 328 U. S. at 552. The 1960 Act specifically authorized the federal courts to consider applications for registration for voting under certain circumstances, so as to afford complete judicial protection against discrimination. 74 Stat. 90. Congress thereby emphasized, once again, the national policy of relying on the Judiciary as the organ through which the right to vote is to be made fully effective. Both Acts express the intent of Congress and the national consensus that, whatever disagreement may exist as to other civil rights, (1) the right to vote should be afforded federal protection to the fullest possible extent, and (2) that protection should principally take the form of court action." (Brief No. 103)

In short, in view of the foregoing, the conclusion appears inevitable that basic jurisdiction of the subject matter exists. We, therefore, deny the motion to dismiss because of lack of jurisdiction.

QUESTION OF SUFFICIENCY OF COMPLAINT

Facts which for the purpose of this determination we must consider as admitted include the following:

1. The New York State Constitutional and statutory provisions in reference to apportionment of State Senators and Assemblymen [278] which are set forth as exhibits in the complaint.

2. The fact that the citizen population of the senatorial districts varies from as low as 146,666 in the Thirty-Ninth Senatorial District (Counties of Essex, Saratoga and Warren) to as high as 344,547 in the Twenty-Sixth and Twenty Ninth Districts (located in Bronx County). (See Exhibits III and IV attached to complaint)

3. The fact that the citizen population of the assembly districts varies from as low as 14,066 (Schuyler County) and 17,461 (Yates County) to as high as 115,000 in Bronx County. (See Exhibits III and IV attached to complaint)

4. That similar results, perhaps with somewhat greater spread, will be likely to occur as a result of the apportionment in 1962 based upon the 1960 census. (See Exhibits I, II and V attached to complaint)

5. In general, that the senatorial districts and assembly districts of certain urban areas contain a greater citizen population than the districts in so-called rural areas.

6. That no failure of the legislature to comply with the state constitution is claimed and only the so-called

malapportionment of senatorial and assembly districts is here involved. (See minutes of November 15, 1961, pp. 32-33)

[279] I believe that this court may take judicial notice[2] of certain additional facts, as follows:

1. The revised Constitution of 1894 containing the present apportionment provisions was submitted to the voters on November 6, 1894 and was approved by a vote of 410,697 to 327,402; the legislative apportionment was approved by a vote of 404,335 to 350,625. See Legislative Manual, New York 1961-1962, page 289. On November 7, 1916, on a vote to revise the Constitution and amend the same, the vote was 506,563 for and 658,269 against. Id. at 292. On November 5, 1957, the vote for a convention to revise the Constitution and amend the same was 1,242,568 for and 1,368,063 against. Id. at 309.

2. In practically every state apportionment results in "over-representation" of the least populated areas. (See Reapportionments of State Legislatures by Lashley G. Harvey, 17 Law & Contemporary Problems 364, 1952; National Municipal League, Compendium on Legislative Apportionment (1st Ed. 1960)).

[280] 3. The State of New York is divided into 62 counties extending from Suffolk County westward to Chautauqua County, from Richmond County in the south to Saint Lawrence, Franklin and Clinton Counties along the St. Lawrence River and the Canadian border, with a total area of 49,576 square miles, with a variety of agricultural, industrial and other economic interests.

2. People v. Wood, 1892, 131 N. Y. 617; Field v. Clark, 1892, 143 U. S. 649; Stawski v. John Hancock Ins. Co., 1957, 7 Misc. 2d 424; People v. Snyder, 1869, 41 N. Y. 397; Taylor v. City of White Plains, 1954, 135 N. Y. S. 2d 773.

4. New York City with a population of 7,781,984 or 46.0% of the state's population of 16,782,304, has 65 assemblymen or 43.3% of the total assembly, and 25 senators or 43.1% of the total number of senators, while the counties other than those in New York City, with 54.0% of the population, have 56.7% of the total assembly and 56.9% of the senate seats.

5. The courts of the State of New York have approved the present methods of apportionment. Matter of Sherrill v. O'Brien, 1907, 188 N. Y. 185; Matter of Fay, 1943, 291 N. Y. 198; see also Matter of Dowling, 1915, 219 N. Y. 44.

There is no authoritative indication that the relative weight accorded individual votes in elections for the state legislature, pursuant to the applicable provisions of the State Constitution, is protected by the equal protection clause of the Fourteenth Amendment. In fact, the contrary seems true. Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." Obviously the enforcement of the evident prohibitions of the Fourteenth Amendment is no invasion of state sovereignty, since the people of the states have by the Constitution so empowered Congress to act. Ex parté Virginia, 1879, 100 U. S. 339, 346.

To assert, however, that the Fourteenth Amendment was intended to give Congress or the federal courts control of the state constitutional provisions for the apportionment of districts for the election of the state legislators is beyond reasonable belief. There is apparently no express or implied incorporation of such power. If it exists, it certainly has never been exercised. Consideration of the existing state constitutions and statutes in

force at the time of the adoption of the Fourteenth Amendment creates formidable doubt with respect to any such intent.[3]

[282] The historical basis of county representation was set forth in brief for the United States as amicus curiae on reargument of Baker v. Carr at the October 1961 Term of the Supreme Court in these words:

> "* * * Historically, the claim of political subdivisions to representation regardless of size has been an important reason for departing from the strict rule of apportionment according to population. Early in our history the town or county was often a dominant unit of government, and the colonial assembly and later the State legislature were composed of representatives from these entities. Since it was the town or county that was being represented, in a very real sense, and not the people directly, it was natural to guarantee each

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3. In this connection, Mr. Justice Edwards in Schulle v. Hare, 1960, 360 Mich. 1, 104 N. W. 2d 63, stated in part:

> "Of the 37 States in the union in 1868, 9 had constitutional provisions for election of representatives to at least 1 of the houses of their legislatures which based representation on constitutionally described legislative districts with constitutionally allocated representation without any pretense of guarantee of equality of popular representation. These States are Vermont, Rhode Island, Connecticut, New Hampshire, New Jersey, Delaware, Maryland, South Carolina and Nevada. [p. 111]
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> * * *
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> "Between 1868 and the present time, additional States have entered the Union. [p. 113]
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> * * *
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> "Of the 13 States whose Constitutions were approved for admission, 8 such Constitutions (for the States of Arizona, Alaska, Hawaii, Idaho, Montana, New Mexico, Oklahoma, Utah) contained provisions for election of at least 1 legislative house which fell into 1 of the 3 categories of disproportion * * *." (pp. 113-114)

> unit at least one representative in one, and sometimes both, of the branches of the legislature. Such provisions are still found in the constitutions of twenty-seven States. * * * (pp. 28-29, Brief No. 6)

The Fourteenth Amendment did not invest and did not attempt to invest Congress with power to legislate upon subjects which are within the domain of state legislation. In re Rahrer, 1891, 140 U. S. 545, 554-555. The states have broad powers to determine the conditions under which the right of suffrage may be exercised in the absence of [283] discrimination condemned by the Constitution (such as the Fifteenth and Nineteenth Amendments).[4] This thought was expressed by Chief Justice Waite in Minor v. Happersett, 1874, 88 U. S. 162, 175, when he wrote:

> "* * * [A]fter the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.' The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, etc.? Nothing is more evident than that the greater must include the less, and if

4. Lassiter v. Northhampton County Bd. of Elections, 1959, 360 U. S. 45; Smith v. Allwright, 1944, 321 U. S. 649, rehearing denied, 322 U. S. 769; Guinn v. United States, 1915, 238 U. S. 347. See also United States v. Cruikshank, 1876, 92 U. S. 542; Davis v. Schnell, D.C.D. Ala., 1949, 81 F. Supp. 872, aff'd, 336 U. S .933.

> all were already protected why go through with the form of amending the Constitution to protect a part?"

The Minor case held in effect that the limitation of suffrage to male citizens was not a violation of the Fourteenth Amendment.

[284] The Fifteenth Amendment and the Nineteenth Amendment together provide that the rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, previous condition of servitude or sex. "In fact, the very command of the Amendment [i.e., the Fifteenth] recognizes the possession of the general power of the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals. * * * [T]he amendment does not change, modify or deprive the States of their full power as to suffrage except of course as to the subject with which the Amendment deals and to the extent that obedience to its command is necessary." *Guinn* v. *United States*, 1915, 238 U. S. 347, 362. See also *Pope* v. *Williams*, 1904, 193 U. S. 621. The right to suffrage is not inherent in citizenship, nor is it a natural and inalienable right. Unless restrained by constitutional limitations, the legislature may lawfully confer the right of suffrage upon such portions of the citizens of the United States, as it may deem expedient, and may deny that right to others. *United States* v. *Miller*, D.C.D. Ind., 1901, 107 Fed. 913. See also *United States* v. *Reese*, 1875, 92 U. S. 214.

The Fourteenth, Fifteenth and Nineteenth Amendments were not designed to abrogate the Tenth Amendment, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States,

are reserved to the States respectively, or to the people." [285] except to the extent reasonably indicated by the restrictions of such subsequent amendments. *Siegel* v. *Ragen*, 7 Cir., 1950, 180 F. 2d 785, cert. denied 339 U. S. 990, rehearing denied, 340 U. S. 847. See *United States* v. *Butler*, 1936, 297 U. S. 1; *Gordon* v. *United States*, 1864, 117 U. S. 697; *The Collector* v. *Day*, 1870, 78 U. S. 113, 124.

The United States Supreme Court has repeatedly acted adversely upon claims involving complaints similar to the one in this case. *Cook* v. *Fortson*, D.C.N.D. Ga., 1946, 68 F. Supp. 624 and *Tharman* v. *Duckworth*, D.C.N.D. Ga., 1946, 68 F. Supp. 744 (county unit system), appeals dismissed, 329 U. S. 675; *MacDougall* v. *Green*, D.C.N.D. Ill., 1948, 80 F. Supp. 725 (requirements of signatures of 200 qualified voters from each of at least 50 counties as a prerequisite for nomination for state office), aff'd, 1948, 335 U. S. 281; *South* v. *Peters*, D.C.N.D. Ga., 1950, 89 F. Supp. 672 (county unit rule), aff'd, 1950, 339 U. S. 276 ("Relief prayed for be denied and that the petition be dismissed."); *Remmey* v. *Smith*, D.C.E.D. Pa., 1951, 102 F. Supp. 708 (complaint—malapportionment of state legislative districts), appeal dismissed, 1952, 342 U. S. 916 (lack of a substantial federal question); *Kidd* v. *McCanless*, 1956, 200 Tenn. 273, 292 S.W. 2d 40 (malapportionment of state legislative districts), appeal dismissed, 1956, 352 U. S. 920; *Radford* v. *Gary*, D.C.W.D. Okla., 1956, 145 F. Supp. 541 (state legislature apportionment of state legislative districts), aff'd, 1957, 352 U. S. 991; *Matthews* v. *Handley*, D.C.N.D. Ind., 1959, [286] 179 F. Supp. 470 (Attempt to have federal court declare a state revenue unconstitutional because enacted by a state legislature in which districts were not apportioned as required by state constitution), aff'd, 1959, 361 U. S. 127.

Substantial authority thus supports the position taken by this present statutory court. In MacDougal *v.* Green, 1948, 335 U. S. 281, in a per curiam opinion, the majority of the Supreme Court stated:

> "* * * *To assume that political power is a function exclusively of numbers is to disregard the practicalities of government.* Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States. Colegrove *v.* Green, 328 U. S. 549, and Colegrove *v.* Barrett, 330 U. S. 804." 335 U. S. at 283-284 (Emphasis added) (Nominating procedures.)

Cf. Wood *v.* Broom, 1932, 287 U. S. 1, where Justices Brandeis, Stone, Roberts and Cardozo were of the opinion that the decree should be dismissed "for want of equity" (congressional districts involved).[5]

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5. Holmes, District Judge, on a three-judge court, dissenting in Broom v. Wood, D.C.S.D. Miss., 1932, 1 F. Supp. 134, and whose position was in effect sustained by the United States Supreme Court in Wood v. Broom, supra:

> "* * * The equal protection clause of the Fourteenth Amendment is inapplicable. No statutory or constitutional provision gives any elector the right to vote in a district numerically equal in inhabitants to every other congressional district. * * *" (1 F. Supp. at 137)

[287] Opinions by previous three-judge courts are in agreement with this court. In a per curiam majority opinion in South *v.* Peters, D.C.N.D. Ga. 1950, 89 F. Supp. 672, the court stated:

> "Plaintiff's proposition that a vote in Fulton County has only one tenth the force that it would have but for the county unit rule of the Neill Primary Act, which is unjust and undemocratic, has strong appeal, but it is not a matter for this court to decide. Our question is primarily whether the federal Constitution is violated thereby. In general, that Constitution is not committed to elections by the people over the whole affected territory in which every vote will have equal weight, but rather the voting is by smaller units of unequal population and unequal voting power for each vote. • • • [p. 679]
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> • • •
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> "We therefore cannot say there is any general constitutional principle forbidding or discouraging the use of territorial subdivisions in fixing the manner of conducting an election by the people. Whether subdivisions shall be made and how closely they shall be equalized is a matter of policy, that is to say, is a political question in which courts of equity may not meddle to set up their own ideas. • • • [p. 679-680]
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> • • •
>
> "The federal Constitution does not take from the States their right to set up their own internal organization and prescribe the manner of State elections. • • •" (p. 680)

Biggs, Circuit Judge, for a three-judge court in Remmey *v.* Smith, supra declared:

> "• • • *A fortiori* if a court of the United States should not compel a State Legislature to effect a

> reapportionment relative to the national representative elective system, it should not do so in respect to an apportionment system whereby Representatives in States Legislatures are to be chosen. An action such as that at bar may strike at the very heart of our dual system of government under which the United States and the States must remain sovereign in their spheres. * * *" (p. 710)

[288] In a concurring opinion by Bard, District Judge, in the same case, it was stated :

> "The free and untrammeled right or privilege of suffrage is not given by any article of or Amendments to the Federal Constitution. * * *" (p. 711)

The Supreme Court of Wisconsin in State ex rel Thomson *v.* Zimmerman, 1953, 264 Wis. 644, 60 N.W. 2d 416, held that a statute providing that area shall be figured at 30% and population at 70% in establishing the 33 districts each of which is entitled to a representative in the state senate did not deprive citizens of equal protection of the laws contrary to the Fourteenth Amendment of the Federal Constitution. "We consider that it lies with the people of the state to determine the basis upon which legislative districts are to be established and their will in this is final."[6]

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6. Anthony Lewis (Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057, April 1958) has stated:

> "* * * interests other than population may be important in devising a system of representation. For example, geographic areas may have political interests that suggest their use as units of representation. The only system based entirely on population, without regard to geography, would be one of proportional representation. Representation based on districts of approximately equal population tends to accommodate both geographic and numerical interests.".

[289] The plaintiffs charge the State of New York with a "purposeful and systematic plan" to discriminate against certain geographic areas and classes of persons. (Par. 17 of complaint) However, the rule is general with reference to the enactments of all legislative bodies that the courts cannot, with certain exceptions, inquire into the motives of the legislators. Soon Hing *v.* Crowley, 1885, 113 U. S. 703, 710. "The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge and in good faith." United States *v.* Des Moines, etc., Company, 1892, 142 U. S. 510, 544. See also, Sonzinsky *v.* United States, 1937, 300 U. S. 506, 513; McGowan *v.* Maryland, 1961, 366 U. S. 420, 468, 469.

I, therefore, find that the complaint fails to state a claim upon which relief can be granted and, accordingly, it must be dismissed. In this connection, I have not considered the affidavits separately submitted by the plaintiffs, since I have concluded that the motion may be determined upon the complaint (including exhibits attached) alone.

Want of Equity and Want of Justiciability

If the insufficiency of the complaint be not adequate to require dismissal of the complaint, as I believe it is, then the want of equity in the relief sought, or, to view it slightly differently, want of justiciability, clearly demands dismissal.

[290] In New York State, as already enunciated, the present system of legislative apportionment, whatever may be its merits, has been imbedded in a state constitution which has been approved by referendum of the voters who have subsequently voted to retain the constitution in

which the method adopted is contained. The legislative acts are wholly in accord with the state constitutional requirements.

In whatever manner we may view the basis of Judge Frankfurter's admonition in Colegrove *v.* Green, supra, that "Courts ought not to enter this political thicket," the proposed and unprecedented direction by a federal court of the *state constitutional provisions* in respect to state legislative apportionments would initiate a far-reaching revision of federal-state relationships. Efforts to control the basic law of the states in such matters would impose an imponderable burden upon the federal courts in nearly all of the states of this union. The inherent impracticabilities of such a course demonstrate the want of equity or justiciability in such a procedure.

Whether the Supreme Court of the United States in disposing of Baker *v.* Carr, supra, recently reargued and now *sub judice*, will decide that the Tennessee voters under federal constitutional provisions have a right to federal enforcement of the Tennessee state constitutional apportionment provisions, is yet to be determined. That question [291] involves effectuation of a specific plan. This case involves interference with the enforcement of state constitutional provisions as well as some consequential but ill-defined supervision of the formation and enactment of a substitute plan.

The teachings of the decisions of the Supreme Court show that want of equity or justiciability demands the dismissal of this suit. These factors, I believe, were the decisional rationale revealed in cases in which the complaint was dismissed because of the "want of a substantial federal question" or because of "want of equity." See Colegrove *v.* Green, supra; Colegrove *v.* Barrett, supra; MacDougall *v.* Green, supra; South *v.* Peters, supra; Remmey *v.* Smith, supra.

Thus, want of equity and justiciability demand denial of the relief sought.

In view of the foregoing, it is unnecessary to pass upon the motion to dismiss as to the plaintiff W.M.C.A., Inc. upon the ground of lack of standing.

The complaint is dismissed.

So ordered.

Dated: New York, N. Y.
January 11, 1962.

[292] WATERMAN, *Circuit Judge*, concurring:

I concur in denying relief to the complainants.

I believe we must follow the majority result in *Colegrove* v. *Green*, 328 U. S. 549 (1946). Whether we deny relief by adopting the rationale of the three Justices who labeled apportionment matters "political questions" or by adopting that of Mr. Justice Rutledge who thought the Court should decline to exercise its equity jurisdiction, the result in the present case is the same—a dismissal of the complaint without reaching the merits because the issues are "not meet for adjudication." Frankfurter, *J.*, in *Gomillion* v. *Lightfoot*, 364 U. S. 339, 346 (1960), explaining the decision in *Colegrove* v. *Green*.

My colleagues deny relief after having taken jurisdiction of the case. I do not quarrel directly with them, but because I believe this litigation is not justiciable I think it appropriate to point out the admonition of Mr. Justice Frankfurter relative to "jurisdiction" stated by him in *Colegrove*.

> "We are of the opinion that the petitioners ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction.' It must be resolved by considerations

on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination."

[293] Judge Levet also recognizes that *Colegrove* may require us to dismiss this case for lack of justiciability. I concur in this part of his opinion. I cannot concur in his full opinion, however, for I think it unnecessary and undesirable at this time to pass on the justiciability of this or similar future litigation in the event that *Colegrove* v. *Green* should cease to be controlling authority, and I do not think it appropriate for me to express any views with reference to whether the present legislative apportionment in the State of New York violates the Fourteenth Amendment to the United States Constitution.

Therefore, inasmuch as the plaintiffs have failed to state a claim upon which relief can be granted, I concur with my colleagues in dismissing the complaint.

[294] Ryan, *District Judge*, concurring:

I concur with Judge Levet and the conclusions he has reached that this Court has jurisdiction to entertain this suit and that the complaint should be dismissed on its merits.

Although there is authority for argument that federal courts lack jurisdiction to pass on the propriety of state legislative apportionment, Colegrove v. Green, 328 U. S. 549 (1946), subsequent decisions[1] appear to hold that

1. *Thomas* v. *Duckworth*, 68 F. Supp. 744, appeal dismissed 330 U. S. 825; *Smith* v. *Peters*, 80 F. Supp. 672, aff'd 339 U. S. 276; *Kidd* v. *McCanless*, 200 Tenn. 273, appeal dismissed 352 U. S. 920; *Radford* v. *Gary*, 145 F. Supp. 541, aff'd 352 U. S. 991; *Magraw* v. *Donovan*, 163 F. Supp. 184

federal courts do have jurisdiction to rule on the Constitutional propriety of state legislative apportionment but that this jurisdiction should be exercised only under the most compelling circumstances.

The breadth and scope of the compelling reasons which would support exercise of this jurisdiction have not been specifically defined. But *Gomillion* v. *Lightfoot*, 364 U. S. 339, 346 (1960), [295] seems to carry the implication that an attempt by a state to abridge the vote or operate to effectively discriminate against any particular class or group through the fixing of internal political boundaries or legislative election districts will lie within this area of compelling circumstances. Apparent and patent violation of the 15th Amendment or of any other specific injunction of the Constitution would then lift the propriety of state action out of the so-called political sphere.

There is no claim made here that the apportionment formula before us or the laws enacted to apply it effect a discrimination against any particular racial or religious group. The complaint is that the method of apportionment gives rise solely to territorial or purely geographical discrimination which grossly dilutes the vote of urban dwellers. Judicial interference by federal courts with the power of the state to create internal political or geographical boundaries affecting the right of suffrage can not be supported by mere territorial discrimination and nothing more.

This Court, while possessing jurisdiction, on the undisputed facts before us should not interfere in what Mr. Justice Frankfurter has characterized as a "political thicket". I concur with Judge Levet in exercising jurisdiction and in dismissing the complaint.

APPENDIX B

UNITED STATES CONSTITUTION, FEDERAL STATUTES AND STATE CONSTITUTION AND STATUTES INVOLVED.

UNITED STATES CONSTITUTION: Amendment XIV, § 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. * * *

FEDERAL STATUTES:

U. S. C., Title 42, Sections 1983 and 1988:

1983 Civil Action for deprivation of rights—

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

1988 The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and title 18 for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity

with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object or are different in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty.

U. S. C., Title 28, Section 1343, § (3):

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person. * * * To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any rights, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

The Federal Declaratory Judgment Act, U. S. C., Title 28, Sections 2201 and 2202:

§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not

further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

THE CONSTITUTION OF THE STATE OF NEW YORK

ARTICLE III — LEGISLATURE

§ 1. The legislative power of this State shall be vested in the Senate and Assembly.

§ 2. The senate shall consist of fifty members, except as hereinafter provided. The senators elected in the year one thousand eight hundred and ninety-five shall hold their offices for three years, and their successors shall be chosen for two years. The assembly shall consist of one hundred and fifty members. The assemblymen elected in the year one thousand nine hundred and thirty-eight, and their successors, shall be chosen for two years. Amended by the people Nov. 2, 1937.

§ 3. The state shall be divided into fifty districts to be called senate districts, each of which shall choose one senator. The districts shall be numbered from one to fifty, inclusive.

District number one (1) shall consist of the counties of Suffolk and Richmond.

District number two (2) shall consist of the county of Queens.

District number three (3) shall consist of that part of the county of Kings comprising the first, second, third, fourth, fifth and sixth wards of the city of Brooklyn.

District number four (4) shall consist of that part of the county of Kings comprising the seventh, thirteenth, nineteenth and twenty-first wards of the city of Brooklyn.

District number five (5) shall consist of that part of the county of Kings comprising the eighth, tenth, twelfth and thirtieth wards of the city of Brooklyn, and the ward of the city of Brooklyn which was formerly the town of Gravesend.

District number six (6) shall consist of that part of the county of Kings comprising the ninth, eleventh, twentieth and twenty-second wards of the city of Brooklyn.

District number seven (7) shall consist of that part of the county of Kings comprising the fourteenth, fifteenth, sixteenth and seventeenth wards of the city of Brooklyn.

District number eight (8) shall consist of that part of the county of Kings comprising the twenty-third, twenty-fourth, twenty-fifth and twenty-ninth wards of the city of Brooklyn, and the town of Flatlands.

District number nine (9) shall consist of that part of the county of Kings comprising the eighteenth, twenty-sixth, twenty-seventh and twenty-eighth wards of the city of Brooklyn.

District number ten (10) shall consist of that part of the county of New York within and bounded by a line beginning at Canal street and the Hudson river, and running thence along Canal street, Hudson street, Dominick street, Varick street, Broome street, Sullivan street, Spring street, Broadway, Canal street, the Bowery, Division street, Grand street and Jackson street, to the East river and thence around the southern end of Manhattan

Island, to the place of beginning, and also Governor's, Bedloe's and Ellis islands.

District number eleven (11) shall consist of that part of the county of New York lying north of district number ten, and within and bounded by a line beginning at the junction of Broadway and Canal street, and running thence along Broadway, Fourth street, the Bowery and Third avenue, St. Mark's place, Avenue A, Seventh street, Avenue B, Clinton street, Rivington street, Norfolk street, Division street, Bowery and Canal street, to the place of beginning.

District number twelve (12) shall consist of that part of the county of New York lying north of districts numbers ten and eleven and within and bounded by a line beginning at Jackson street and the East river, and running thence through Jackson street, Grand street, Division street, Norfolk street, Rivington street, Clinton street, Avenue B, Seventh street, Avenue A, St. Mark's place, Third avenue, East Fourteenth street to the East river, and along the East river, to the place of beginning.

District number thirteen (13) shall consist of that part of the county of New York lying north of district number ten, and within and bounded by a line beginning at the Hudson river at the foot of Canal street, and running thence along Canal street, Hudson street, Dominick street, Varick street, Broome street, Sullivan street, Spring street, Broadway, Fourth street, the Bowery and Third avenue, Fourteenth street, Sixth avenue, West Fifteenth street, Seventh avenue, West Nineteenth street, Eighth avenue, West Twentieth street, and the Hudson river, to the place of beginning.

District number fourteen (14) shall consist of that part of the county of New York lying north of districts num-

bers twelve and thirteen, and within and bounded by a line beginning at East Fourteenth street and the East river, and running thence along East Fourteenth street, Irving place, East Nineteenth street, Third avenue, East Twenty-third street, Lexington Avenue, East Fifty-third street, Third avenue, East Fifty-second street, and the East river, to the place of beginning.

District number fifteen (15) shall consist of that part of the county of New York lying north of district number thirteen, and within and bounded by a line beginning at the junction of West Fourteenth street and Sixth avenue, and running thence along Sixth avenue, West Fifteenth street, Seventh avenue, West Fortieth street, Eighth avenue, and the transverse road across Central park at Ninety-seventh street, Fifth avenue, East Ninety-sixth street, Lexington avenue, East Twenty-third street, Third avenue, East Nineteenth street, Irving place, and Fourteenth street, to the place of beginning.

District number sixteen (16) shall consist of that part of the county of New York lying north of district number thirteen, and within and bounded by a line beginning at Seventh avenue and West Nineteenth street, and running thence along West Nineteenth street, Eighth avenue, West Twentieth street, the Hudson river, West Forty-sixth street, Tenth avenue, West Forty-third street, Eighth avenue, West Fortieth street and Seventh avenue, to the place of beginning.

District number seventeen (17) shall consist of that part of the county of New York lying north of district number sixteen, and within and bounded by a line beginning at the junction of Eighth avenue and West Forty-third street, and running thence along West Forty-third street, Tenth avenue, West Forty-sixth street, the Hudson

river, West Eighty-ninth street, Tenth or Amsterdam avenue, West Eighty-sixth street, Ninth or Columbus avenue, West Eighty-first street and Eighth avenue, to the place of beginning.

District number eighteen (18) shall consist of that part of the county of New York lying north of district number fourteen, and within and bounded by a line beginning at the junction of East Fifty-second street and the East river, and running thence along East Fifty-second street, Third avenue, East Fifty-third street, Lexington avenue, East Eighty-fourth street, Second avenue, East Eighty-third street and the East river, to the place of beginning; and also Blackwell's island.

District number nineteen (19) shall consist of that part of the county of New York lying north of district number seventeen, and within and bounded by a line beginning at West Eighty-ninth street and the Hudson river, and running thence along the Hudson river and Spuyten Duyvil creek around the northern end of Manhattan island; thence southerly along the Harlem river to the north end of Fifth avenue; thence along Fifth avenue, East One Hundred and Twenty-ninth street, Fourth or Park avenue, East One Hundred and Tenth street, Fifth avenue, the transverse road across Central park at Ninety-seventh street, Eighth avenue, West Eighty-first street, Ninth or Columbus avenue, West Eighty-sixth street, Tenth or Amsterdam avenue and West Eighty-ninth street, to the place of beginning.

District number twenty (20) shall consist of that part of the county of New York lying north of districts numbers eighteen and fifteen, and within and bounded by a line beginning at East Eighty-third street and the East river, running thence through East Eighty-third street,

Second avenue, East Eighty-fourth street, Lexington avenue, East Ninety-sixth street, Fifth avenue, East One Hundred and Tenth street, Fourth or Park avenue, East One Hundred and Nineteenth street to the Harlem river, and along the Harlem and East rivers to the place of beginning; and also Randall's island and Ward's island.

All of the above districts in the county of New York bounded upon or along the boundary waters of the county, shall be deemed to extend to the county line.

District number twenty-one (21) shall consist of that part of the county of New York lying north of districts numbers nineteen and twenty, within and bounded by a line beginning at East One Hundred and Nineteenth street and the Harlem river, and running thence along East One Hundred and Nineteenth street, Fourth or Park avenue, One Hundred and Twenty-ninth street, Fifth avenue, and the Harlem river, to the place of beginning; and all that part of the county of New York not hereinbefore described.

District number twenty-two (22) shall consist of the county of Westchester.

District number twenty-three (23) shall consist of the counties of Orange and Rockland.

District number twenty-four (24) shall consist of the counties of Dutchess, Columbia and Putnam.

District number twenty-five (25) shall consist of the counties of Ulster and Greene.

District number twenty-six (26) shall consist of the counties of Delaware, Chenango and Sullivan.

District number twenty-seven (27) shall consist of the counties of Montgomery, Fulton, Hamilton and Schoharie.

District number twenty-eight (28) shall consist of the counties of Saratoga, Schenectady and Washington.

District number twenty-nine (29) shall consist of the county of Albany.

District number thirty (30) shall consist of the county of Rensselaer.

District number thirty-one (31) shall consist of the counties of Clinton, Essex and Warren.

District number thirty-two (32) shall consist of the counties of St. Lawrence and Franklin.

District number thirty-three (33) shall consist of the counties of Otsego and Herkimer.

District number thirty-four (34) shall consist of the county of Oneida.

District number thirty-five (35) shall consist of the counties of Jefferson and Lewis.

District number thirty-six (36) shall consist of the county of Onondaga.

District number thirty-seven (37) shall consist of the counties of Oswego and Madison.

District number thirty-eight (38) shall consist of the counties of Broome, Cortland and Tioga.

District number thirty-nine (39) shall consist of the counties of Cayuga and Seneca.

District number forty (40) shall consist of the counties of Chemung, Tompkins and Schuyler.

District number forty-one (41) shall consist of the counties of Steuben and Yates.

District number forty-two (42) shall consist of the counties of Ontario and Wayne.

District number forty-three (43) shall consist of that part of the county of Monroe comprising the towns of Brighton, Henrietta, Irondequoit, Mendon, Penfield, Perinton, Pittsford, Rush and Webster, and the fourth, sixth, seventh, eighth, twelfth, thirteenth, fourteenth, sixteenth,

seventeenth and eighteenth wards of the city of Rochester, as at present constituted.

District number forty-four (44) shall consist of that part of the county of Monroe comprising the towns of Chili, Clarkson, Gates, Greece, Hamlin, Ogeden, Parma, Riga, Sweden and Wheatland, and the first, second, third, fifth, ninth, tenth, eleventh, fifteenth, nineteenth and twentieth wards of the City of Rochester, as at present constituted.

District number forty-five (45) shall consist of the counties of Niagara, Genesee and Orleans.

District number forty-six (46) shall consist of the counties of Allegany, Livingston and Wyoming.

District number forty-seven (47) shall consist of that part of the county of Erie comprising the first, second, third, sixth, fifteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third and twenty-fourth wards of the city of Buffalo, as at present constituted.

District number forty-eight (48) shall consist of that part of the county of Erie comprising the fourth, fifth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and sixteenth wards of the city of Buffalo, as at present constituted.

District number forty-nine (49) shall consist of that part of the county of Erie comprising the seventeenth, eighteenth and twenty-fifth wards of the City of Buffalo, as at present constituted; and all the remainder of the said county of Erie not hereinbefore described.

District number fifty (50) shall consist of the counties of Chautauqua and Cattaraugus.

§ 4. Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be con-

trolling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor. The legislature, by law, shall provide for the making and tabulation by state authorities of an enumeration of the inhabitants of the entire state to be used for such purposes, instead of a federal census, if the taking of a federal census in any tenth year from the year nineteen hundred thirty be omitted or if the federal census fails to show the number of aliens or Indians not taxed. If a federal census, though giving the requisite information as to the state at large, fails to give the information as to any civil or territorial divisions which is required to be known for such purposes, the legislature, by law, shall provide for such an enumeration of the inhabitants of such parts of the state only as may be necessary, which shall supersede in part the federal census and be used in connection therewith for such purposes. The legislature, by law, may provide in its discretion for an enumeration by state authorities of the inhabitants of the state, to be used for such purposes, in place of a federal census, when the return of a decennial federal census is delayed so that it is not available at the beginning of the regular session of the legislature in the second year after the year nineteen hundred thirty or after any tenth year therefrom, or if an apportionment of members of assembly and readjustment or alteration of senate districts is not made at or before such a session. At the regular session in the year nineteen hundred thirty-two, and at the first regular session after the year nineteen hundred forty and after each tenth year therefrom the senate districts shall be readjusted or altered, but if,

in any decade, counting from and including that which begins with the year nineteen hundred thirty-one, such a readjustment or alteration is not made at the time above prescribed, it shall be made at subsequent session occurring not later than the sixth year of such decade, meaning not later than nineteen hundred thirty-six, nineteen hundred forty-six, nineteen hundred fifty-six, and so on; provided, however, that if such districts shall have been readjusted or altered by law in either of the years nineteen hundred thirty or nineteen hundred thirty-one, they shall remain unaltered until the first regular session after the year nineteen hundred forty. Such districts shall be so readjusted or altered that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the first year of the next decade as above defined, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county. No town, except a town having more than a full ratio of apportionment, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts more nearly equal in number of inhabitants excluding aliens.

No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall

have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators.

The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent.

The senate districts, including the present ones, as existing immediately before the enactment of a law readjusting or altering the senate districts, shall continue to be the senate districts of the state until the expirations of the terms of the senators then in office, except for the purpose of an election of senators, for full terms beginning at such expirations, and for the formation of assembly districts.

5. The members of the assembly shall be chosen by single districts and shall be apportioned by the legislature at each regular session at which the senate districts are readjusted or altered, and by the same law, among the several counties of the state, as nearly as may be according to the number of their respective inhabitants, excluding aliens. Every county heretofore established and separately organized, except the county of Hamilton, shall

always be entitled to one member of assembly, and no county shall hereafter be erected unless its population shall entitle it to a member. The county of Hamilton shall elect with the county of Fulton, until the population of the county of Hamilton shall, according to the ratio, entitle it to a member. But the legislature may abolish the said county of Hamilton and annex the territory thereof to some other county or counties.

The quotient obtained by dividing the whole number of inhabitants of the state, excluding aliens, by the number of members of assembly, shall be the ratio for apportionment, which shall be made as follows: One member of assembly shall be apportioned to every county, including Fulton and Hamilton as one county, containing less than the ratio and one-half over. Two members shall be apportioned to every other county. The remaining members of assembly shall be apportioned to the counties having more than two ratios according to the number of inhabitants, excluding aliens. Members apportioned on remainders shall be apportioned to the counties having the highest remainders in the order thereof respectively. No county shall have more members of assembly than a county having a greater number of inhabitants, excluding aliens.

The assembly districts, including the present ones, as existing immediately before the enactment of a law making an apportionment of members of assembly among the counties, shall continue to be the assembly districts of the state until the expiration of the terms of members then in office, except for the purpose of an election of members of assembly for full terms beginning at such expirations.

In any county entitled to more than one member, the board of supervisors, and in any city embracing an entire

county and having no board of supervisors, the common council, or if there be none, the body exercising the powers of a common council, shall assemble at such times as the legislature making an apportionment shall prescribe, and divide such counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be, of convenient and contiguous territory in as compact form as practicable, each of which shall be wholly within a senate district formed under the same apportionment, equal to the number of members of assembly to which such county shall be entitled, and shall cause to be filed in the office of the secretary of state and of the clerk of such county, a description of such districts, specifying the number of each district and of the inhabitants thereof, excluding aliens, according to the census or enumeration used as the population basis for the formation of such districts; and such apportionment and districts shall remain unaltered until after the next reapportionment of members of assembly, except that the board of supervisors of any county containing a town having more than a ratio of apportionment and one-half over may alter the assembly districts in a senate district containing such town at any time on or before March first, nineteen hundred forty-six. In counties having more than one senate district, the same number of assembly districts shall be put in each senate district, unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly district shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest number of inhabitants, excluding aliens, as the case may require. No town, except a town having more than

a ratio of apportionment and one-half over, and no block in a city inclosed by streets or public ways, shall be divided in the formation of assembly districts, nor shall any districts contain a greater excess in population over an adjoining district in the same senate district, than the population of a town or block therein adjoining such assembly district. Towns or blocks which, from their location may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens. Nothing in this section shall prevent the division, at any time, of counties and towns and the erection of new towns by the legislature.

An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same.

STATE STATUTES: STATE LAW, SECTIONS 120-123

§ 120. Present senate districts

The senate districts of this state, as existing immediately before the enactment of this article, shall continue to be the senate districts of the state until the expiration of the terms of the senators then in office, except for the purpose of an election of senators for full terms beginning at such expirations and for the formation of assembly districts. Added L.1953, c. 893, eff. Nov. 19, 1953.

§ 121. New senate districts

Except as provided in section one hundred twenty, the senate districts of this state from and after the time this article takes effect, shall consist as follows:

First. The first senate district shall consist of the county of Suffolk.

Second. The second senate district shall consist of that part of the county of Nassau within and bounded by a line beginning at a point where the dividing line between the town of Hempstead and the town of North Hempstead is intersected by Clinton Road (Glen Cove Road) and the easterly boundary line of the incorporated village of Garden City, thence southerly along the boundary line of the incorporated village of Garden City to the dividing line between the incorporated village of Garden City and the incorporated village of Hempstead, thence in a westerly and southerly direction along said dividing line to the easterly boundary line of the incorporated village of Rockville Centre, thence southerly and westerly along said boundary line to the easterly boundary line of the incorporated village of East Rockaway, thence southerly along said boundary line to Station Plaza, to Atlantic avenue, to the intersection of Atlantic avenue, Nassau avenue and Bayside avenue, thence along Bayside avenue to Messick avenue, to Ebert avenue (Anchor street), to Yost Parkway, to Perkins avenue, to Messick avenue, to Oceanside Parkway (Weidner avenue), to Lawson Boulevard, thence along Lawson Boulevard and Lawson Boulevard extended to the waters of Simonson Channel and through the waters of Simonson Channel, Barnum Island Channel and Hog Island Creek to Reynolds Channel, thence westerly through the waters of Reynolds Channel

to the dividing line between the county of Nassau and the county of Queens, thence northerly along said dividing line to the intersection of said dividing line with the dividing line between the county of Queens, the town of Hempstead and the town of North Hempstead, thence easterly along the dividing line between the town of Hempstead and the town of North Hempstead to the place of beginning.

Third. The third senate district shall consist of that part of the county of Nassau which includes the town of North Hempstead, the town of Oyster Bay and the city of Glen Cove; also that portion of the town of Hempstead described as follows: beginning at a point where Bethpage Turnpike intersects the dividing line between the town of Oyster Bay and the town of Hempstead, thence in a westerly direction along Bethpage Turnpike to North Wantagh avenue, thence northerly to Boone street, to Farmedge Road, to the intersection of Farmedge Road and Henry street, thence along Henry street to Maple avenue (Edna avenue), to Jupiter Lane, to Farmedge Road, to Bloomingdale Road (Solar Lane), to Constable Lane, to Marksman Lane, to Barrister Road, to Welder Lane, to Coppersmith Road, to Coachman Lane, to Poet Lane, to the dividing line between the town of Hempstead and the town of Oyster Bay and thence easterly and southerly along said dividing line to the place of beginning.

Fourth. The fourth senate district shall consist of that part of the county of Nassau within and bounded by a line beginning at a point where the dividing line between the town of Hempstead and the town of North Hempstead is intersected by Clinton Road (Glen Cove Road) and the easterly boundary line of the incorporated village of Garden City, thence southerly along said boundary line of the

incorporated village of Garden City to the dividing line between the incorporated villages of Garden City and Hempstead, thence in a westerly and southerly direction along said dividing line to the easterly boundary line of the incorporated village of Rockville Centre, thence southerly and westerly along said boundary line to the easterly boundary line of the incorporated village of East Rockaway, thence southerly along said boundary line to Station Plaza, to Atlantic avenue, to the intersection of Atlantic avenue, Nassau avenue and Bayside avenue, thence along Bayside avenue to Messick avenue, to Ebert avenue (Anchor street), to Yost Parkway, to Perkins avenue, to Messick avenue, to Oceanside Parkway (Weidner avenue), to Lawson Boulevard, thence along Lawson Boulevard and Lawson Boulevard extended to the waters of Simonson Channel and through the waters of Simonson Channel, Barnum Island Channel and Hog Island Creek to Reynolds Channel, thence westerly through the waters of Reynolds Channel to the Atlantic Ocean, thence easterly through the waters of the Atlantic Ocean to the dividing line extended between the town of Oyster Bay and the town of Hempstead, thence northerly along said dividing line extended and said dividing line to Bethpage Turnpike, thence westerly along Bethpage Turnpike to North Wantagh avenue, thence northerly to Boone street, to Farmedge Road, to the intersection of Farmedge Road and Henry street, thence along Henry street to Maple avenue (Edna avenue), to Jupiter Lane, to Farmedge Road, to Bloomingdale Road (Solar Lane), to Constable Lane, to Marksman Lane, to Barrister Road, to Welder Lane, to Coppersmith Road, to Coachman Lane, to Poet Lane, to the dividing line between the town of Hempstead and the town of Oyster Bay, thence westerly and north-

erly along said dividing line to the intersection of the town lines of Oyster Bay, North Hempstead and Hempstead, thence westerly along the dividing line between the town of North Hempstead and the town of Hempstead to the place of beginning; including the city of Long Beach.

Fifth. The fifth senate district shall consist of that part of the county of Queens within and bounded by a line beginning at a point where Utopia Parkway extended intersects the waters of the East River, thence southerly along Utopia Parkway extended and Utopia Parkway to the intersection of Utopia Parkway with One Hundred and Sixty-ninth street, thence along One Hundred and Sixty-ninth street to Thirty-second avenue, to One Hundred and Sixty-eighth street, to Crocheron avenue, thence westerly along Crocheron avenue to Northern Boulevard, to Parsons Boulevard, thence southerly along Parsons Boulevard to Forty-fifth avenue, to Kissena Boulevard, to Elder avenue, to One Hundred and Thirty-third street, to North Hempstead Turnpike, thence easterly to One Hundred and Forty-first street, to Fifty-eighth avenue, to Main street, to Fifty-eighth Road, to One Hundred and Forty-second street, to Fifty-ninth avenue, to One Hundred and Forty-eighth street, to Sixtieth avenue, to One Hundred and Fiftieth street, to Horace Harding Boulevard, to One Hundred and Sixty-fourth street, thence southerly along One Hundred and Sixty-fourth street to Hillside avenue, to One Hundred and Sixty-third street, to Jamaica avenue, thence easterly to Hollis avenue, to Farmers Boulevard, thence southerly to One Hundred and Twenty-second avenue, to Springfield Boulevard, to One Hundred and Twenty-first avenue, thence easterly along One Hundred and Twenty-first avenue and Francis Lewis Boulevard to the dividing line between the county of

Queens and the county of Nassau, thence northerly along said dividing line to the waters of Little Neck Bay, thence westerly through the waters of Little Neck Bay, Long Island Sound and the East River to the place of beginning.

Sixth. The sixth senate district shall consist of that part of the county of Queens within and bounded by a line beginning at a point where Glenmore avenue intersects the dividing line between the county of Queens and the county of Kings, thence easterly along Glenmore avenue to Seventy-sixth street, to Liberty avenue, to One Hundred and Second Road, thence along One Hundred and Second Road to Eighty-fourth street, to One Hundred and Second avenue, to Eighty-sixth street, to One Hundred and First avenue, to Ninety-third street, to Ninety-seventh avenue, to One Hundredth street, to Ninety-fifth avenue, to One Hundred and Tenth street, to Ninety-fifth avenue, to Lefferts Boulevard, to Eighty-ninth avenue, to One Hundred and Thirtieth street, to Jamaica avenue, to One Hundred and Fiftieth street, to Hillside avenue, to One Hundred and Sixty-third street, to Jamaica avenue, to Hollis avenue, to Farmers Boulevard, thence southerly to One Hundred and Twenty-second avenue, to Springfield Boulevard, to One Hundred and Twenty-first avenue, thence easterly along One Hundred and Twenty-first avenue and Francis Lewis Boulevard to the dividing line between the county of Queens and the county of Nassau, thence southerly along said dividing line as it winds and turns to the waters of the Atlantic Ocean and westerly through the waters of the Atlantic Ocean to the dividing line between the county of Queens and the county of Kings, thence northerly along said dividing line as it winds and turns to the place of beginning.

Seventh. The seventh senate district shall consist of that part of the county of Queens within and bounded by a line beginning at a point where Glenmore avenue intersects the dividing line between the county of Queens and the county of Kings, thence easterly along Glenmore avenue to Seventy-sixth street, to Liberty avenue, to One Hundred and second Road, thence along One Hundred and Second Road to Eighty-fourth street, to One Hundred and Second avenue, to Eighty-sixth street, to One Hundred and First avenue, to Ninety-third street, to Ninety-seventh avenue, to One Hundredth street, to Ninety-fifth avenue, to One Hundred and Tenth street, to Ninety-fifth avenue, to Lefferts Boulevard, to Eighty-ninth avenue, to One Hundred and Thirtieth street, to Jamaica avenue, to One Hundred and Fiftieth street, to Hillside avenue, to One Hundred and Sixty-fourth street, thence northerly to Seventy-first avenue, thence westerly to Kissena Boulevard, to Seventieth Road, to One Hundred and Fifty-third street, to Jewel avenue, and thence westerly along Jewel Avenue to Sixty-ninth Road, to Grand Central Parkway, to Jewel avenue, to One Hundred and Eighth street, to Sixty-seventh avenue, thence along Sixty-seventh avenue (Roxton street) to Thornton Place, to Sixty-sixth avenue (Fleet street), thence westerly along Sixty-sixth avenue (Fleet street) to Alderton street, thence northerly along Alderton street to Woodhaven Boulevard, to Eighty-sixth street, to Sixtieth avenue, to Eighty-sixth street, to Fifty-eighth avenue, to Eighty-fourth street, to Fifty-seventh avenue, to Eighty-third street, to Fifty-fourth avenue, to Eighty-second street, to Grand avenue, to Mazeau street, to Caldwell avenue, to Sixty-ninth street, to Sixty-third avenue, to Sixty-ninth Place, to Sixty-ninth street, to Metropolitan avenue, thence westerly along Metropolitan

avenue to the dividing line between the county of Queens and the county of Kings and southerly along said dividing line as it winds and turns to the place of beginning.

Eighth. The eighth senate district shall consist of that part of the county of Queens within and bounded by a line beginning at a point where Utopia Parkway extended intersects the waters of the East River, thence southerly along Utopia Parkway extended and Utopia Parkway to the intersection of Utopia Parkway with One Hundred and Sixty-ninth street, thence along One Hundred and Sixty-ninth street to Thirty-second avenue, to One Hundred and Sixty-eighth street, to Crocheron avenue, thence westerly along Crocheron avenue to Northern Boulevard, to Parsons Boulevard, thence southerly along Parsons Boulevard to Forty-fifth avenue, to Kissena Boulevard, to Elder avenue, to One Hundred and Thirty-third street, to North Hempstead Turnpike, thence easterly to One Hundred and Forty-first street, to Fifty-eighth avenue, to Main street, to Fifty-eighth Road, to One Hundred and Forty-second street, to Fifty-ninth avenue, to One Hundred and Forty-eighth street, to Sixtieth avenue, to One Hundred and Fiftieth street, to Horace Harding Boulevard, to One Hundred and Sixty-fourth street, thence southerly along One Hundred and Sixty-fourth street to Seventy-first avenue, thence westerly to Kissena Boulevard, to Seventieth Road, to One Hundred and Fifty-third street, to Jewel avenue, and thence westerly along Jewel avenue to Sixty-ninth Road, to Grand Central Parkway, to Jewel Avenue, to One Hundred and Eighth street, to Sixty-seventh avenue, thence along Sixty-seventh avenue to Ninety-ninth street, thence northerly along Ninety-ninth street to Sixty-fourth avenue, to Ninety-eighth street, to Horace Harding Boulevard, to Ninety-seventh street, to

Fifty-seventh avenue, to Ninety-sixth street, to Christie avenue, to Junction Boulevard, to Fifty-first avenue, to Ninety-second street, to Fifty-second avenue, to Ninetieth street, to Fifty-first avenue, to Broadway, to Pettit Place, to Layton street, to Baxter avenue, to Broadway, to Brooklyn-Queens Connecting Highway, thence northerly along Brooklyn-Queens Connecting Highway to Astoria Boulevard South, to the intersection of Astoria Boulevard South, Thirty-first street and Hoyt avenue South at Columbus Square, thence westerly along Hoyt avenue South to the waters of the East River and the dividing line between the county of Queens and the county of New York, thence northerly along said dividing line to the dividing line between the county of Queens and the county of Bronx, thence easterly along said dividing line to the place of beginning.

Ninth. The ninth senate district shall consist of that part of the county of Queens within and bounded by a line beginning at a point where Metropolitan avenue intersects the dividing line between the county of Queens and the county of Kings, thence easterly along Metropolitan avenue to Sixty-ninth street, northerly to Sixty-ninth Place, to Sixty-third avenue, to Sixty-ninth street, to Caldwell avenue, to Mazeau street, to the intersection of Mazeau street, Fifty-seventh avenue and Grand avenue, thence along Grand avenue to Eighty-second street, to Fifty-fourth avenue, to Eighty-third street, to Fifty-seventh avenue, to Eighty-fourth street, to Fifty-eighth avenue, to Eighty-sixth street, to Sixtieth avenue to Eighty-sixth street, to Woodhaven Boulevard, to Alderton street, to Sixty-sixth avenue (Fleet street), to Thornton Place, to Sixty-seventh avenue (Roxton street), to Ninety-ninth street, thence northerly along Ninety-ninth street to

Sixty-fourth avenue, to Ninety-eighth street, to Horace Harding Boulevard, to Ninety-seventh street, to Fifty-seventh avenue, to Ninety-sixth street, to Christie avenue, to Junction Boulevard, to Fifty-first avenue, to Ninety-second street, to Fifty-second avenue, to Ninetieth street, to Fifty-first avenue, to Broadway, to Pettit Place, to Layton street, to Baxter avenue, to Broadway, to Brooklyn-Queens Connecting Highway, thence northerly along Brooklyn-Queens Connecting Highway to Astoria Boulevard South, to the intersection of Astoria Boulevard South, Thirty-first street and Hoyt avenue South at Columbus Square, thence westerly along Hoyt avenue South to the waters of the East River, thence southerly through Hell Gate and East Channel in the East River to Newtown Creek and the dividing line between the county of Queens and the county of Kings, thence easterly along said dividing line to the place of beginning.

Tenth. The tenth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where Johnson avenue intersects the dividing line between the county of Kings and the county of Queens, thence westerly along Johnson avenue to Porter avenue, to Flushing avenue, to the intersection of Flushing avenue, Irving avenue and Melrose street, thence westerly along Melrose street to Wilson avenue, to Jefferson street, to Evergreen avenue, to Jefferson street, to Bushwick avenue, to Troutman street, to Myrtle avenue, to Broadway, thence southerly along Broadway to Stuyvesant avenue, to Willoughby avenue, to Broadway, to Reid avenue, to De Kalb avenue, to Broadway, to Patchen avenue, to Van Buren street, to Broadway, to Ralph avenue, to Putnam avenue, to Howard avenue, to the north lane of Atlantic avenue, to Ralph avenue, to the

south lane of Atlantic avenue, to Howard avenue, to St. Marks avenue, thence easterly along St. Marks avenue to the intersection of St. Marks avenue, East New York avenue and Watkins street, thence along East New York avenue to Watkins street, to Liberty avenue, to Alabama avenue, to Atlantic avenue, to Georgia avenue, thence southerly to Belmont avenue, to Pennsylvania avenue, to Sutter avenue, to New Jersey avenue, to Linden Boulevard, to Pennsylvania avenue, to Vandalia avenue, thence along Vandalia avenue and Vandalia avenue extended to the waters of Fresh Creek Basin and through the waters of Fresh Creek Basin, Jamaica Bay, Big Channel and Rockaway Inlet to the dividing line between the county of Kings and the county of Queens, thence easterly and northerly along said dividing line to the place of beginning; including the islands in Jamaica Bay within the county of Kings.

Eleventh. The eleventh senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where Eastern Parkway intersects Grand Army Plaza, thence easterly along Eastern Parkway to Franklin avenue, to St. Johns Place, to Rogers avenue, to Park Place, to Troy avenue, to Prospect Place, to Schenectady avenue, to Park Place, to Utica avenue, to St. Marks avenue, to Rochester avenue, to Prospect Place, to Buffalo avenue, to Park Place, to Ralph avenue, to St. Marks avenue, to Howard avenue, to the south lane of Atlantic avenue, to Ralph avenue, to the north lane of Atlantic avenue, to Howard avenue, thence northerly along Howard avenue to Putnam avenue, to Ralph avenue, to Broadway, to Van Buren street, to Patchen avenue, to Broadway, to De Kalb avenue, to Reid avenue, to Broadway, to Willoughby avenue, to Stuyvesant avenue, to Broadway, to Myrtle avenue, thence westerly along Myrtle

avenue to Throop avenue, to Vernon avenue, to Tompkins avenue, to Willoughby avenue, to Nostrand avenue, to Willoughby avenue, to Bedford avenue, to De Kalb avenue, to Flatbush avenue Extension, thence southerly along Flatbush avenue Extension to Fulton street, to Rockwell Place (Ninety-fourth street), to Lafayette avenue, to Flatbush avenue, thence southerly along Flatbush avenue to and around Grand Army Plaza to the place of beginning.

Twelfth. The twelfth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where East Twenty-fourth street intersects Quentin Road, thence easterly along Quentin Road to Nostrand avenue, to Gerritsen avenue, to Avenue R, to East Thirty-sixth street, to Flatlands avenue, to Avenue L, to Utica avenue, to Avenue M, to Ralph avenue, to Avenue A, to East Eighty-eighth street, to Ralph avenue, to Church avenue, to Remsen avenue, thence northerly along Remsen avenue to the intersection of Remsen avenue, Lefferts avenue and Utica avenue, thence along Utica avenue to Eastern Parkway, to Troy avenue, to Park Place, to Rogers avenue, to St. John's Place, to Franklin avenue, to Eastern Parkway, to and around the southern end of Grand Army Plaza to Flatbush avenue, thence southerly along Flatbush avenue to Martense street, to Bedford avenue, to Snyder avenue, to Flatbush avenue, to the intersection of Flatbush avenue, Foster avenue and Bedford avenue, thence along Bedford avenue to Glenwood Road, to East Twenty-third street, to Campus Road, thence westerly, southerly, and easterly along Campus Road to East Twenty-third street, to Avenue I, to East Twenty-fourth street, to Avenue J, to East Twenty-third street, to Avenue K, to East Twenty-fourth street, to Avenue N, to East Twenty-third street, to Ocean street, to East Twenty-fourth street, to the place of beginning.

Thirteenth. The thirteenth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where Bay Ridge avenue extended intersects the waters of Upper New York Bay, thence along Bay Ridge avenue extended and Bay Ridge avenue to Shore Road, thence northerly along Shore Road to Ridge avenue (Ridge Boulevard), thence along Ridge avenue and Second avenue to Sixty-fifth street, to Third avenue, to Sixty-third street, to Fourth avenue, to Forty-fifth street, to Fifth avenue, to Thirty-ninth street, to Ninth avenue, to Thirty-seventh street, to Fort Hamilton Parkway, to the intersection of Fort Hamilton Parkway, Prospect Park Southwest, Coney Island avenue and Parkside avenue at Park Circle, thence along Parkside avenue to Flatbush avenue and northerly along Flatbush avenue to and around the eastern side of Grand Army Plaza to Flatbush avenue, to Lafayette avenue, to Rockwell Place (Ninety-fourth street), thence along Rockwell Place (Ninety-fourth street) to Fulton street, to Flatbush avenue, to De Kalb avenue, to the intersection of De Kalb avenue and Fulton street, thence along Fulton street to Duffield street (Fifty-ninth street), to Willoughby street, to Bridge street, to Tillary street, to Duffield street (Fifty-ninth street), to Concord street, to Bridge street, to Prospect street, to Jay street, to Talman street, to Bridge street, thence northerly along Bridge street and Bridge street extended to the waters of the East River and southerly through the waters of the East River, Buttermilk Channel and Upper New York Bay to the place of beginning.

Fourteenth. The fourteenth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where Bay Ridge avenue extended intersects the waters of Upper New

York Bay, thence along Bay Ridge avenue extended and Bay Ridge avenue to Shore Road, thence northerly along Shore Road to Ridge avenue (Ridge Boulevard), thence along Ridge avenue and Second avenue to Sixty-fifth street, to Third avenue, to Sixty-third street, to Fourth avenue, to Forty-fifth street, to Fifth avenue, to Thirty-ninth street, to Ninth avenue, to Forty-first street, to the intersection of Forty-first street, Tenth avenue and New Utrecht avenue, thence southerly along New Utrecht avenue to Thirteenth avenue, thence along Thirteenth avenue to Fifty-sixth street, to New Utrecht avenue, to Sixty-third street, to Seventeenth avenue, to Sixty-second street, to Eighteenth avenue, to Shore Parkway, to Bay Nineteenth street, thence southerly along Bay Nineteenth street and Bay Nineteenth street extended to the waters of Gravesend Bay and northerly through the waters of Gravesend Bay, Lower Bay and Upper New York Bay to the place of beginning.

Fifteenth. The fifteenth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where West Tenth street extended intersects the waters of the Atlantic Ocean, thence northerly along West Tenth street extended and West Tenth street to Surf avenue, to West Twelfth street, to Neptune avenue, to Shell Road, thence northerly to Triton avenue, to West Sixth street, to the intersection of West Sixth street and Shell Road, thence along Shell Road and McDonald avenue to Avenue U, to West street, to Avenue T, to East Second street, to Avenue P, to East Third street, to Avenue O, to East Fourth street, to Avenue N, to East Fifth street, to Avenue L, to Ocean Parkway, to Eighteenth avenue, to East Fifth street, to Fort Hamilton Parkway, to Thirty-seventh street, to Ninth avenue,

to Forty-first street, to the intersection of Forty-first street, Tenth avenue and New Utrecht avenue, thence southerly along New Utrecht avenue to Thirteenth avenue, thence along Thirteenth avenue to Fifty-sixth street, to New Utrecht avenue, to Sixty-third street, to Seventeenth avenue, to Sixty-second street, to Eighteenth avenue, to Shore Parkway, to Bay Nineteenth street, thence southerly along Bay Nineteenth street and Bay Nineteenth street extended to the waters of Gravesend Bay and southerly through the waters of Gravesend Bay, Lower New York Bay and the Atlantic Ocean to the place of beginning.

Sixteenth. The sixteenth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where Bedford avenue extended intersects the waters of Sheepshead Bay, thence northerly along Bedford avenue extended and Bedford avenue to Shore Parkway, to East Twenty-third street, to Voorhies avenue, to East Twenty-fourth street, to Quentin Road, thence easterly along Quentin Road to Nostrand avenue, to Gerritsen avenue, to Avenue R, to East Thirty-sixth street, to Flatlands avenue, to Avenue L, to Utica avenue, to Avenue M, to Ralph avenue, to Avenue A, to East Eighty-eighth street, to Ralph avenue, to Church avenue, to Remsen avenue, thence northerly along Remsen avenue to the intersection of Remsen avenue, Lefferts avenue and Utica avenue, thence along Utica avenue to Eastern Parkway, to Troy avenue, to Prospect Place, thence easterly along Prospect Place to Schenectady avenue, to Park Place, to Utica avenue, to St. Marks avenue, to Rochester avenue, to Prospect Place, to Buffalo avenue, to Park Place, to Ralph avenue, to St. Marks avenue, to the intersection of St. Marks avenue, East New York avenue and Watkins street, thence along East New York avenue to

Watkins street, to Liberty avenue, to Alabama avenue, to Atlantic avenue, to Georgia avenue, thence southerly to Belmont avenue, to Pennsylvania avenue, to Sutter avenue, to New Jersey avenue, to Linden Boulevard, to Pennsylvania avenue, to Vandalia avenue, thence westerly along Vandalia avenue and Vandalia avenue extended to the waters of Fresh Creek Basin and through the waters of Fresh Creek Basin, Jamaica Bay Big Channel and Rockaway Inlet to Sheepshead Bay and to the place of beginning.

Seventeenth. The seventeenth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where West Tenth street extended intersects the waters of the Atlantic Ocean, thence northerly along West Tenth street extended and West Tenth street to Surf avenue, to West Twelfth street, to Neptune avenue, to Shell Road, thence northerly to Triton avenue, to West Sixth street, to the intersection of West Sixth street and Shell Road, thence along Shell Road and McDonald avenue to Avenue U, to West street, to Avenue T, to East Second street, to Avenue P, to East Third street, to Avenue O, to East Fourth street, to Avenue N, to East Fifth street, to Avenue L, to Ocean Parkway, to Eighteenth avenue, to East Fifth street, to Fort Hamilton Parkway, to the intersection of Fort Hamilton Parkway, Prospect Park Southwest, Coney Island avenue and Parkside avenue at Park Circle, thence along Parkside avenue to Flatbush avenue, to Martense street, to Bedford avenue, to Snyder avenue, to Flatbush avenue, thence southerly along Flatbush avenue to the intersection of Flatbush avenue, Foster avenue and Bedford avenue, thence along Bedford avenue to Glenwood Road, to East Twenty-third street, to Campus Road, thence westerly,

southerly, and easterly along Campus Road, to East Twenty-third street, to Avenue I, to East Twenty-fourth street, to Avenue J, to East Twenty-third street, to Avenue K, to East Twenty-fourth street, to Avenue N, to East Twenty-third street, to Olean street, to East Twenty-fourth street, to Voorhies avenue, to East Twenty-third street, to Shore Parkway, to Bedford avenue, thence southerly along Bedford avenue and Bedford avenue extended to the waters of Sheepshead Bay and through the waters of Sheepshead Bay, Rockaway Inlet and the Atlantic Ocean to the place of beginning.

Eighteenth. The eighteenth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where Johnson avenue intersects the dividing line between the county of Kings and the county of Queens, thence westerly along Johnson avenue to Porter avenue, to Flushing avenue, to the intersection of Flushing avenue, Irving avenue and Melrose street, thence westerly along Melrose street to Wilson avenue, to Jefferson street, to Evergreen avenue, to Jefferson street, to Bushwick avenue, to Troutman street, to Myrtle avenue, to Throop avenue, to Vernon avenue, to Tompkins avenue, to Willoughby avenue, to Nostrand avenue, to Willoughby avenue, to Bedford avenue, to De-Kalb avenue, to the intersection of De Kalb avenue and Fulton street, thence along Fulton street to Duffield street (Fifty-ninth street), to Willoughby street, to Bridge street, to Tillary street, to Duffield street (Fifty-ninth street), to Concord street, to Bridge street, to Prospect street, to Jay street, to Talman street, to Bridge street, thence northerly along Bridge street and Bridge street extended to the waters of the East River and northerly through the waters of the East River to the waters of

Newtown Creek and the dividing line between the county of Kings and the county of Queens, thence southerly along said dividing line to the place of beginning.

Nineteenth. The nineteenth senate district shall consist of the county of Richmond.

Twentieth. The twentieth senate district shall consist of that part of the county of New York within and bounded by a line beginning at the point where East Forty-first street extended intersects the waters of the East River, thence westerly along East Forty-first street extended and East Forty-first street to First avenue, to East Fortieth street, to Third avenue, to East Thirty-third street, to Lexington avenue, to East Twenty-sixth street, to Third avenue, to East Tenth street, to Fourth avenue, to Wanamaker Place at East Ninth street, thence easterly along East Ninth street to Third avenue, thence southerly along Third avenue and through Cooper Square to the Bowery, thence along the Bowery to East Fourth street, to Lafayette street, to Houston street, thence westerly along Houston street and West Houston street to Hudson street, to the intersection of Hudson street and Eighth avenue at Abingdon Square, thence along Eighth avenue to West Fourteenth street, to Seventh avenue, to West Twenty-fourth street, to Eighth avenue, to West Thirty-first street, to Seventh avenue, to West Thirty-fourth street, to Eighth avenue, to West Thirty-eighth street, to Seventh avenue, to West Thirty-ninth street, to Eighth avenue, to West Fortieth street, to Seventh avenue, to West Fiftieth street, to Avenue of the Americas, to West Fifty-fourth street, to Eighth avenue, to West Fifty-fifth street, to Ninth avenue, thence along Ninth avenue and Columbus avenue to West Sixty-first street,

to Central Park West, thence northerly along Central Park West to Cathedral Parkway at West One Hundred and Tenth street, thence easterly along Cathedral Parkway and West One Hundred and Tenth street to Fifth avenue, to East One Hundredth street, to Madison avenue, to East Ninety-eighth street, to Park avenue, to East Ninety-sixth street, to Lexington avenue, to East Ninety-fourth street, to Third avenue, to East Eighty-ninth street, to Lexington avenue, to East Eighty-seventh street, to Third avenue, to East Eighty-fourth street, to Lexington avenue, to East Eighty-second street, to Third avenue, to East Eightieth street, to Second avenue, to East Seventy-fifth stret, to First avenue, to East Seventy-fourth street, to York avenue, thence northerly along York avenue to East Eighty second street, to East End avenue, to East Eighty fourth street and Gracie Square, thence easterly along Gracie Square and Gracie Square extended to the waters of the East River and southerly through the waters of the East River to the place of beginning; including Welfare Island.

Twenty first. The twenty first senate district shall consist of that part of the county of New York within and bounded by a line beginning at a point where West One Hundredth street extended intersects the waters of the Hudson River, thence easterly along West One Hundredth street extended and West One Hundredth street to West End avenue, to West One Hundred and First street, to Broadway, to West One Hundred and Second street, to Amsterdam avenue, to West Ninety-seventh street, to Central Park West, thence northerly along Central Park West and Eighth avenue to West One Hundred and Eighteenth street, to Lenox avenue, to West One Hundred and Seventeenth Street, thence along West One Hundred

and Seventeenth street and East One Hundred and Seventeenth street to Madison avenue, to East One Hundred and Nineteenth street, to Park avenue, to East One Hundred and Twentieth street, to Madison avenue, to East One Hundred and Twenty-fourth street, to Fifth avenue, to East One Hundred and Twenty-fifth street, to Madison avenue, to East One Hundred and Twenty-seventh street, to Fifth avenue, to East One Hundred and Thirtieth street, to Madison avenue, to East One Hundred and Thirty-second street, to Fifth avenue, to West One Hundred and Thirty-fourth street, to Seventh avenue, to West One Hundred and Thirty-third street, to St. Nicholas avenue, to Edgecombe avenue, to West One Hundred and Thirty-seventh street, to St. Nicholas avenue, to West One Hundred and Fifty-second street, to Amsterdam avenue, to West One Hundred and Fifty-third street, to Broadway, to Fort Washington avenue, to West One Hundred and Sixty-first street, thence westerly along West One Hundred and Sixty-first street and West One Hundred and Sixty-first street extended to the waters of the Hudson River and southerly through the waters of the Hudson River to the place of beginning.

Twenty-second. The twenty-second senate district shall consist of that part of the county of New York within and bounded by a line beginning at a point where East One Hundred and Thirty-fifth street extended intersects the waters of the Harlem River, thence westerly along East One Hundred and Thirty-fifth street extended and East One Hundred and Thirty-fifth street to Madison avenue, to East One Hundred and Thirtieth street, to Fifth avenue, to East One Hundred and Twenty-seventh street, to Madison avenue, to East One Hundred and Twenty-fifth street, to Fifth avenue, to East One Hundred

and Twenty-fourth street, to Madison avenue, to East One Hundred and Twentieth street, to Park avenue, to East One Hundred and Nineteenth street, to Madison avenue, to East One Hundred and Seventeenth street, thence westerly along East One Hundred and Seventeenth street and West One Hundred and Seventeenth street to Lenox avenue, to West One Hundred and Eighteenth street, to Eighth avenue, to Cathedral Parkway at West One Hundred and Tenth street, thence easterly along Cathedral Parkway and West One Hundred and Tenth street to Fifth avenue, to East One Hundredth street, to Madison avenue, to East Ninety-eighth street, to Park avenue, to East Ninety-sixth street, to Lexington avenue, to East Ninety-fourth street, to Third avenue, to East Eighty-ninth street, to Lexington avenue, to East Eighty-seventh street, to Third avenue, to East Eighty-fourth street, to Lexington avenue, to East Eighty-second street, to Third avenue, to East Eightieth street, to Second avenue, to East Seventy-fifth street, to First avenue, to East Seventy-fourth street, to York avenue, thence northerly along York avenue to East Eighty-second street, to East End avenue, to East Eighty-fourth street and Gracie Square, thence easterly along Gracie Square and Gracie Square extended to the waters of the East River, thence northerly through the waters of the East River and the Harlem River to the place of beginning; including Randall's Island, Ward's Island, Sunken Meadow Island and Mill Rocks Island.

Twenty-third. The twenty-third senate district shall consist of that part of the county of New York within and bounded by a line beginning at a point where East One Hundred and Thirty-fifth street extended intersects the waters of the Harlem River, thence westerly along East

One Hundred and Thirty-fifth street extended and East One Hundred and Thirty-fifth street to Madison avenue, to East One Hundred and Thirty-second street, to Fifth avenue, to West One Hundred and Thirty-fourth street, to Seventh avenue, to West One Hundred and Thirty-third street, to St. Nicholas avenue, to Edgecombe avenue, to West One Hundred and Thirty-seventh street, to St. Nicholas avenue, to West One Hundred and Fifty-second street, to Amsterdam avenue, to West One Hundred and Fifty-third street, to Broadway, to Fort Washington avenue, to West One Hundred and Sixty-first street, thence westerly along West One Hundred and Sixty-first street and West One Hundred and Sixty-first street extended to the waters of the Hudson River, thence northerly through the waters of the Hudson River to the Harlem River and the dividing line between the county of New York and the county of Bronx, thence easterly and southerly along said dividing line as it winds and turns to the place of beginning.

Twenty-fourth. The twenty-fourth senate district shall consist of that part of the county of New York within and bounded by a line beginning at a point where East Forty-first street extended intersects the waters of the East River, thence westerly along East Forty-first street extended and East Forty-first street to First avenue, to East Fortieth street, to Third avenue, to East Thirty-third street, to Lexington avenue, to East Twenty-sixth street, to Third avenue, to East Tenth street, to Fourth avenue, to Wanamaker Place at East Ninth street, thence easterly along East Ninth street to Third avenue, thence southerly along Third avenue and through Cooper Square to the Bowery, thence along the Bowery to East Fourth street, to Lafayette street, to Houston street, thence west-

erly along Houston street and West Houston street to Hudson street, to Bethune street, to Greenwich street, to West Twelfth street, to Hudson street, to Horatio street, to Washington street, to West Fourteenth street, to Tenth avenue, thence southerly along Tenth avenue to Bloomfield street, thence westerly along Bloomfield street and Bloomfield street extended to the waters of the Hudson River, thence through the waters of the Hudson River, Upper Bay, Buttermilk Channel and the East River to the place of beginning; including Ellis Island, Governor's Island and Bedloe's Island.

Twenty-fifth. The twenty-fifth senate district shall consist of that part of the county of New York within and bounded by a line beginning at a point where Bloomfield street extended intersects the waters of the Hudson River, thence easterly along Bloomfield street extended and Bloomfield street to Tenth avenue, to West Fourteenth street to Washington street, to Horatio street, to Hudson street, to West Twelfth street, to Greenwich street, to Bethune street, to Eighth avenue, to West Fourteenth street to Seventh avenue, to West Twenty-fourth street, to Eighth avenue, to West Thirty-first street, to Seventh avenue, to West Thirty-fourth street to Eighth avenue, to West Thirty-eighth street, to Seventh avenue, to West Thirty-ninth street, to Eighth avenue to West Fortieth street, to Seventh avenue, to West Fiftieth street, to Avenue of the Americas, to West Fifty-fourth street to Eighth avenue, to West Fifty-fifth street, to Ninth avenue, thence along Ninth avenue and Columbus avenue to West Sixty-first street, to Central Park West, thence northerly along Central Park West to West Ninety-seventh street, to Amsterdam avenue, to West One Hundred and Second street, to ~~Broadway, to West~~ One Hundred and First

street, to West End avenue, to West One Hundredth street, thence westerly along West One Hundredth street and West One Hundredth street extended to the waters of the Hudson River and southerly through the waters of the Hudson River to the place of beginning.

Twenty-sixth. The twenty-sixth senate district shall consist of that part of the county of Bronx within and bounded by a line beginning at a point where St. Ann's avenue extended intersects Bronx Kills in the Harlem River, thence northerly along St. Ann's avenue extended and St. Ann's avenue to East One Hundred and Forty-seventh street, to Brook avenue, to East One Hundred and Fifty-sixth street, to Third avenue, to East One Hundred and Fifty-eighth street, to Brook avenue, to East One Hundred and Fifty-ninth street, to St. Ann's avenue, to the intersection of St. Ann's avenue, Third avenue and Boston Road, thence along Boston Road to the intersection of Boston Road, Jefferson Place and Crotona avenue, thence along Crotona avenue to East One Hundred and Seventieth street, to Clinton avenue, to Crotona Park South, to Fulton avenue, to East One Hundred and Seventy-fifth street, to Third avenue, to East Tremont avenue, thence westerly along East Tremont avenue and West Tremont avenue to the Harlem River and southerly through the waters of the Harlem River to the place of beginning.

Twenty-seventh. The twenty-seventh senate district shall consist of that part of the county of Bronx within and bounded by a line beginning at a point where St. Ann's avenue extended intersects Bronx Kills in the Harlem River, thence northerly along St. Ann's avenue extended and St. Ann's avenue to East One Hundred and Forty-seventh street, to Brook avenue, to East one Hun-

dred and Fifty sixth street, to Third avenue, to East One Hundred and Fifty eighth street, to Brook avenue, to East One Hundred and Fifty ninth street, to St. Ann's avenue, to the intersection of St. Ann's avenue, Third avenue and Boston Road, thence along Boston Road to the intersection of Boston Road, Jefferson Place and Crotona avenue, thence along Crotona avenue to East One Hundred and Seventieth street, to Clinton avenue, to Crotona Park South, to Fulton avenue, to East One Hundred and Seventy fifth street, to Third avenue, to East Tremont avenue, thence southeasterly along East Tremont avenue to Bronx Park avenue, to East One Hundred and Eightieth street, to Morris Park avenue, thence southerly along Morris Park avenue and Morris Park avenue extended to East One Hundred and Seventy seventh street, to Rosedale avenue, to East One Hundred and Seventy second street, to Noble avenue, to Watson avenue, to the intersection of Watson avenue, Metcalf avenue and Sound View avenue at Ludlow Square, thence along Sound View avenue to Lafayette avenue, to Beach avenue, to Bronx River avenue, to Underhill avenue, thence along Underhill avenue and Underhill avenue extended to the East River and westerly through the waters of the East River to the place of beginning; including Riker's Island, North Brother Island and South Brother Island.

Twenty eighth. The twenty eighth senate district shall consist of that part of the county of Bronx within and bounded by a line beginning at a point where West Tremont avenue extended intersects the Harlem River, thence easterly along West Tremont avenue extended, West Tremont avenue and East Tremont avenue to Bronx Park avenue, to East One Hundred and Eightieth street, to Morris Park avenue, thence northerly along Morris

Park avenue to Amethyst street, to Rhinelander avenue, to Amethyst street, to Sagamore street, to Unionport Road, to the intersection of Unionport Road, Bronx Park East and Bronxdale avenue, thence along Bronxdale avenue to Cruger Avenue, to Brady avenue, to Bogart avenue, to Woodmansten Place, to Paulding avenue, to Westchester Esplanade, and thence northerly along Westchester Esplanade to Bronx and Pelham Parkway, to the intersection of Bronx and Pelham Parkway, Williamsbridge Road and Laconia avenue, thence along Laconia avenue to Mace avenue, to Ten Broeck avenue, to Allerton avenue, to Throop avenue, to Adee avenue, to Bouck avenue, to Burke avenue, to Yates avenue, to Boston Road, to Burke avenue, to Cruger avenue, to Magenta street, to Holland avenue, to Gun Hill Road, thence westerly along Gun Hill Road to Olinville avenue, to Duncomb street and Duncomb street extended to Bronx River Parkway, thence southerly along Bronx River Parkway to East Two Hundred and Fourth street extended, thence westerly along East Two Hundred and Fourth street extended and East Two Hundred and Fourth street to Webster avenue, to East One Hundred and Ninety-ninth street, to Decatur avenue, to East Two Hundred and First street, to Marion avenue, to Bedford Park Boulevard, thence along Bedford Park Boulevard to Villa avenue, to East Two Hundred and Fourth street, thence easterly along East Two Hundred and Fourth street to East Mosholu Parkway, South, thence southerly to Bainbridge avenue, thence along Bainbridge avenue and East Two Hundred and Fifth street to Hull avenue, to East Two Hundred and Ninth street, to Decatur avenue, to Gun Hill road, thence westerly along Gun Hill Road to Jerome avenue, to West Mosholu Parkway North, to West Gun Hill Road, thence westerly along West Gun Hill Road

and Van Courtlandt Park South to Major Deegan Expressway, to West Two Hundred and Thirty-ninth street, to Broadway, to West Two Hundred and Thirty-eighth street, to Bailey avenue, to Major Deegan Expressway (Albany Crescent), to West Two Hundred and Thirty-first street, to Bailey avenue, to West Kingsbridge Road, thence westerly along West Kingsbridge Road to the dividing line between the county of New York and the county of Bronx, thence southerly along said dividing line and through the Harlem River to the place of beginning.

Twenty-ninth. The twenty-ninth senate district shall consist of that part of the county of Bronx within and bounded by a line beginning at a point where Underhill avenue extended intersects the East River, thence along Underhill avenue extended and Underhill avenue to Bronx River avenue to Beach avenue, to Lafayette avenue, to Sound View avenue, thence along Sound View avenue through Ludlow Square to the intersection of Metcalf avenue, Sound View avenue and Watson avenue, thence along Watson avenue to Noble avenue, to East One Hundred and Seventy-second street, to Rosedale avenue, to East One Hundred and Seventy-seventh street, to Morris Park avenue extended, thence along Morris Park avenue extended and Morris Park avenue to Amethyst street, to Rhinelander avenue, to Amethyst street, to Sagamore street, to Unionport Road, to the intersection of Unionport Road, Bronx Park East and Bronxdale avenue, thence along Bronxdale avenue to Cruger avenue, to Brady avenue, to Bogart avenue, to Woodmansten Place, to Paulding avenue, to Westchester Esplanade, and thence northerly along Westchester Esplanade to Bronx and Pelham Parkway, to the intersection of Bronx and Pelham Parkway, Williamsbridge Road and Laconia avenue,

thence along Laconia avenue to Mace avenue, to Ten Broeck avenue, to Allerton avenue, to Throop avenue, to Adee avenue, to Bouck avenue, to Burke avenue, to Yates avenue, to Boston Road, to Burke avenue, to Cruger avenue, to Magenta street, to Holland avenue, to Gun Hill Road, thence westerly along Gun Hill Road to Olinville avenue, to Duncomb street and Duncomb street extended to the Bronx River Parkway, thence southerly along Bronx River Parkway to East Two Hundred and Fourth street extended, thence westerly along East Two Hundred and Fourth street extended and East Two Hundred and Fourth Street to Webster avenue, to East One Hundred and Ninety-ninth street, to Decatur avenue, to East Two Hundred and First street, to Marion avenue, to Bedford Park Boulevard, thence along Bedford Park Boulevard to Villa avenue, to East Two Hundred and Fourth street, thence easterly along East Two Hundred and Fourth street to East Mosholu Parkway South, thence southerly to Bainbridge avenue, thence along Bainbridge avenue and East Two Hundred and Fifth street to Hull avenue, to East Two Hundred and Ninth street, to Decatur avenue, to Gun Hill Road, thence westerly along Gun Hill Road to Jerome avenue, to West Mosholu Parkway North, to West Gun Hill Road, thence westerly along West Gun Hill Road and Van Courtlandt Park South to Major Deegan Expressway, to West Two Hundred and Thirty-ninth street, to Broadway, to West Two Hundred and Thirty-eighth street, to Bailey avenue, to Major Deegan Expressway (Albany Crescent) to West Two Hundred and Thirty first Street, to Bailey avenue, to West Kingsbridge Road, thence westerly along West Kingsbridge Road to the dividing line between the county of New York and the county of Bronx, thence northerly and westerly

along said line as it winds and turns to the Harlem River and westerly through the waters of the Harlem River to the Hudson River, thence northerly through the waters of the Hudson River to the Bronx-Westchester county line and easterly along said line to the waters of Long Island Sound, thence southerly through the waters of Long Island Sound and the East River to the place of beginning: including City Island, Hunter's Island, Hart Island, Twin Island, High Island, Middle Reef Island, Rat Island, The Blauzes, Chimney Sweeps, Cuban Ledge, Big Tom, Green Flats, Hog Island, East Nonations, South Nonations, and all other islands in Long Island Sound within the boundary line of the county of Bronx.

Thirtieth. The thirtieth senate district shall consist of that part of Westchester county comprising the town of Pelham, town of Rye, town of Mamaroneck, and the city of New Rochelle, city of Rye, and that portion of the city of Mount Vernon described as follows:

Beginning at the intersection of Mount Vernon avenue with the boundary line between the city of Yonkers and the city of Mount Vernon, thence easterly along Mount Vernon avenue to North Terrace avenue, to Oak street, to North High Street, to Elm street, to West Lincoln avenue, to Howard street, to North High street, to William street, to North Terrace avenue, to West Broad street and westerly along West Broad street to the boundary line between the city of Mount Vernon and the city of Yonkers, thence northerly, easterly, southerly, westerly and northerly along the city line of the city of Mount Vernon to the place of beginning.

Thirty-first. The thirty-first senate district shall consist of that part of Westchester county comprising the

town of Bedford, town of Cortlandt, town of Harrison, town of Lewisboro, town of Mount Pleasant, town of Newcastle, town of North Castle, town of North Salem, town of Ossining, town of Poundridge, town of Somers, town of Yorktown, town of Scarsdale, town of Eastchester, city of Peekskill and that portion of the city of White Plains described as follows:

Beginning at the intersection of Alexander avenue with the boundary line between the city of White Plains and the town of Greenburgh, thence easterly along Alexander avenue to Chase avenue, to Lee avenue, to Putnam avenue, to Chatterton Parkway, to Hawley street, to Trenton avenue, to Whitney street, to Battle avenue, to Harding avenue, to Chatterton avenue, to Central avenue, to the intersection of Central avenue, Russell street and County Center Road, and thence along County Center Road to the boundary line between the city of White Plains and the town of Greenburgh, thence northerly, easterly, southerly, westerly and northerly along the city line of the city of White Plains to the place of beginning.

Thirty-second. The thirty-second senate district shall consist of that part of Westchester county comprising the city of Yonkers, town of Greenburgh and portions of the cities of Mount Vernon and White Plains, described as follows:

That portion of the city of Mount Vernon beginning at the intersection of Mount Vernon avenue with the boundary line between the city of Yonkers and the city of Mount Vernon, thence along Mount Vernon avenue to North Terrace avenue, to Oak street, to North High street, to Elm street, to West Lincoln avenue, to Howard street, to North High street, to William street, to North Terrace avenue, to West Broad street and westerly along West

Broad street to the boundary line between the city of Mount Vernon and the city of Yonkers, thence southerly along the city line of the city of Mount Vernon to the place of beginning.

Also that portion of the city of White Plains beginning at the intersection of Alexander avenue with the boundary line between the city of White Plains and the town of Greenburgh, thence easterly along Alexander avenue to Chase avenue, to Lee avenue, to Putnam avenue, to Chatterton Parkway, to Hawley street, to Trenton avenue, to Whitney street, to Battle avenue, to Harding avenue, to Chatterton avenue, to Central avenue, to the intersection of Central avenue, Russell street and County Center Road, and along County Center Road to the boundary line between the city of White Plains and the town of Greenburgh, thence westerly and southerly along the city line of the city of White Plains to the place of beginning.

Thirty-third. The thirty-third senate district shall consist of the counties of Orange and Rockland.

Thirty-fourth. The thirty-fourth senate district shall consist of the counties of Delaware, Greene, Sullivan and Ulster.

Thirty-fifth. The thirty-fifth senate district shall consist of the counties of Columbia, Dutchess and Putnam.

Thirty-sixth. The thirty-sixth senate district shall consist of the county of Albany.

Thirty-seventh. The thirty-seventh senate district shall consist of the counties of Rensselaer and Washington.

Thirty-eighth. The thirty-eighth senate district shall consist of the counties of Schenectady and Schoharie.

Thirty-ninth. The thirty-ninth senate district shall consist of the counties of Essex, Saratoga and Warren.

Fortieth. The fortieth senate district shall consist of the counties of Clinton, Franklin and St. Lawrence.

Forty-first. The forty-first senate district shall consist of the counties of Fulton, Hamilton, Herkimer and Montgomery.

Forty-second. The forty-second senate district shall consist of the county of Oneida.

Forty-third. The forty-third senate district shall consist of the counties of Lewis, Jefferson and Oswego.

Forty-fourth. The forty-fourth senate district shall consist of that part of the county of Onondaga within the city of Syracuse within and bounded by a line beginning at a point where Erie Boulevard intersects the east city line, thence westerly along Erie Boulevard to the easterly end of Lombard street, to Cherry street, to East Fayette street, to South Crouse avenue, to East Genesee street, to the intersection of East Genesee street and East Jefferson street, thence along East Jefferson street to the intersection of East Jefferson street and Montgomery street, thence along Montgomery street to East Onondaga street, to the intersection of West Onondaga street, South Clinton street and Gifford street, thence along Gifford street to South Wilbur avenue, to Tennyson avenue, to South Lowell avenue, to Tompkins street, to North Lowell avenue, to Ulster street, to West Fayette street, to Schuyler street, to North Lowell avenue, to West Genesee street, to Emerson avenue, to Erie street, to Willis avenue, to Herkimer street, thence westerly along Herkimer street and Herkimer street extended to the west city line and

northerly, easterly and southerly along said city line as it winds and turns to the place of beginning; together with the towns of Clay, Cicero, Camillus, Elbridge, Geddes, Lysander, Marcellus, Skaneateles, Salina and Van Buren.

Forty-fifth. The forty-fifth senate district shall consist of that part of the county of Onondaga within the city of Syracuse within and bounded by a line beginning at a point where Erie Boulevard intersects the east city line, thence westerly along Erie Boulevard to the easterly end of Lombard street, to Cherry street, to East Fayette street, to South Crouse avenue, to East Genesee street, to the intersection of East Genesee street and East Jefferson street, thence along East Jefferson street to the intersection of East Jefferson street and Montgomery street, thence along Montgomery street to East Onondaga street, to the intersection of West Onondaga street, South Clinton street and Gifford street, thence along Gifford street to South Wilbur avenue, to Tennyson avenue, to South Lowell avenue, to Tompkins street, to North Lowell avenue, to Ulster street, to West Fayette street, to Schuyler street, to North Lowell avenue, to West Genesee street, to Emerson avenue, to Erie street, to Willis avenue, to Herkimer street, thence westerly along Herkimer street and Herkimer street extended to the west city line and southerly, easterly and northerly along said city line as it winds and turns to the place of beginning; together with the towns of De Witt, Fabius, Lafayette, Manlius, Onondaga, Otisco, Pompey, Spafford, Tully; also the Onondaga Indian Reservation.

Forty-Sixth. The forty-sixth senate district shall consist of the counties of Madison, Cortland, Chenango and Otsego.

Forty-seventh. The forty-seventh senate district shall consist of the county of Broome.

Forty-eighth. The forty-eighth senate district shall consist of the counties of Cayuga, Tompkins and Tioga.

Forty-ninth. The forty-ninth senate district shall consist of the counties of Steuben and Chemung.

Fiftieth. The fiftieth senate district shall consist of the counties of Wayne, Ontario, Seneca, Yates and Schuyler.

Fifty-first. The fifty-first senate district shall consist of that part of the county of Monroe within the city of Rochester within and bounded by a line beginning at a point where the Genesee River extended intersects the waters of Lake Ontario, thence southerly through the waters of the Genesee River to Avenue E, to Conkey avenue, to Avenue D, to Harris street, to Avenue A, to Gladys street, to Nielson street, to Harris street, to Clifford avenue, to Durgin street, to Evergreen street, to Conkey avenue, to Clifford avenue, to Clinton avenue North, to Westcott street, to St. Paul street, to Cumberland street, to Clinton avenue North, to Mortimer street, to Water street North, thence along Water street North and Water street South to Broad street, to the waters of the Genesee River and southerly through the waters of the Genesee River to Clarissa street, thence easterly along Clarissa street to Mt. Hope avenue, to Averill avenue, to South avenue, to Caroline street, to Goodman street South, to Richard street, to Wilcox street, to Monroe avenue, to Canterbury Road, to Vassar street, to Harvard street, to Berkeley street, to Milburn street, to Culver Road, to Monroe avenue, to the city line, thence westerly, southerly and northerly along said city line as it winds and turns to

the waters of Lake Ontario and through the waters of Lake Ontario to the Genesee River and the place of beginning; together with the towns of Chili, Clarkson, Gates, Greece, Henrietta, Hamlin, Ogden, Parma, Riga, Sweden, Wheatland and Rush.

Fifty-second. The fifty-second senate district shall consist of that part of the county of Monroe with the city of Rochester within and bounded by a line beginning at a point where the Genesee River extended intersects the waters of Lake Ontario, thence southerly through the waters of the Genesee River to Avenue E, to Conkey avenue, to Avenue D, to Harris street, to Avenue A, to Gladys street, to Nielson street, to Harris street, to Clifford avenue, to Durgin street, to Evergreen street, to Conkey avenue, to Clifford avenue, to Clinton avenue North, to Westcott street, to St. Paul street, to Cumberland street, to Clinton avenue North, to Mortimer street, to Water street North, thence along Water street North and Water street South to Broad street, to the waters of the Genesee River and southerly through the waters of the Genesee River to Clarissa street, thence easterly along Clarissa street to Mt. Hope avenue, to Averill avenue, to South avenue, to Caroline street, to Goodman street South, to Richard street, to Wilcox street, to Monroe avenue, to Canterbury Road, to Vassar street, to Harvard street, to Berkeley street, to Milburn street, to Culver Road, to Monroe avenue, to the city line, thence easterly and northerly along said city line as it winds and turns to the waters of Lake Ontario and through the waters of Lake Ontario to the Genesee River and the place of beginning; including the towns of Brighton, Mendon, Penfield, Perinton, Pittsford, Webster and Irondequoit.

Fifty-third. The fifty-third senate district shall consist of the counties of Livingston, Allegany, Wyoming, Genesee and Orleans.

Fifty-fourth. The fifty-fourth senate district shall consist of the county of Niagara.

Fifty-fifth. The fifty-fifth senate district shall consist of that part of the county of Erie within the city of Buffalo within and bounded by a line beginning at a point where Delaware avenue intersects the north city line, thence southerly along Delaware avenue to Hertel avenue, to Colvin avenue, to Linden avenue, to Delaware avenue, to Knox avenue, to Edgepark avenue, to Amherst street, to Meadow Road, to Middlesex Road, to Delaware avenue, to West Delevan avenue, to Main street, to Masten avenue, to Woodlawn avenue, to Chester street, to Glenwood avenue, to Masten avenue, to Laurel street, to Jefferson avenue, to Best street, to Herman street, to the intersection of Herman street, Genesee street and High street, thence along High street to Fox street, to Genesee street, to Monroe street, to Beckwith street, to Adams street, to Broadway, to Monroe street, to Peckham street, to Adams street, to Howard street, to Monroe street, to Clinton street, to Madison street, to East Eagle street, thence westerly along East Eagle street to Oak street, to Clinton street, to Ellicott street, to East Eagle street, to Main street, to Erie street, to Franklin street, to Church street, to the intersection of Church street, Upper and Lower Terrace and Mechanic street, thence along Lower Terrace to Charles street, to Perry Boulevard, to Erie street, thence along Erie street and Erie street extended to the waters of Buffalo Harbor and northerly through the waters of Buffalo Harbor and the Niagara River to a point where the north city line extended intersects the

waters of the Niagara River, thence easterly along said city line extended and said city line to the place of beginning, including Squaw Island and Bird Island Pier Park; together with the towns of Grand Island and Tonawanda; also including the city of Tonawanda.

Fifty-sixth. The fifty-sixth senate district shall consist of that part of the county of Erie within the city of Buffalo within and bounded by a line beginning at a point where Delaware avenue intersects the north city line, thence southerly along Delaware avenue to Hertel avenue, to Colvin Avenue, to Linden avenue, to Delaware avenue, to Knox avenue, to Edgepark avenue, to Amherst street, to Meadow Road, to Middlesex Road, to Delaware avenue, to West Delevan avenue, to Main street, to Masten avenue, to Woodlawn avenue, to Chester street, to Glenwood avenue, to Masten avenue, to Laurel street, to Jefferson avenue, to Best street, to Herman street, to the intersection of Herman street, Genesee street and High street, thence along High street to Fox street, to Genesee street, to Monroe street, to Beckwith street, to Adams street, to Broadway, to Monroe street, to Peckham street, to Emslie street, to William street, to Stanton street, to Peckham street, to Smith street, to Clinton street, to Babcock street, to Dorothy avenue, to Scoville avenue, to Clinton street, to Willet street, to Griswold street, to the east city line, thence northerly and westerly along said city line to the place of beginning; together with the town of Cheektowaga.

Fifty-seventh. The fifty-seventh senate district shall consist of that part of the county of Erie within the city of Buffalo within and bounded by a line beginning at a point where Griswold street intersects the east city line, thence westerly along Griswold street to Willet street, to

Clinton street, to Scoville avenue, to Dorothy avenue, to Babcock street, to Clinton street, to Smith street, to Peckham street, to Stanton street, to William street, to Emslie street, to Peckham street, to Adams street, to Howard street, to Monroe street, to Clinton street, to Madison street, to East Eagle street, thence westerly along East Eagle street to Oak street, to Clinton street, to Ellicott street, to East Eagle street, to Main street, to Erie street, to Franklin street, to Church street, to the intersection of Church street, Upper and Lower Terrace and Mechanic street, thence along Lower Terrace to Charles street to Perry Boulevard, to Erie street, thence along Erie street and Erie street extended to the waters of Buffalo Harbor and southerly through the waters of Buffalo Harbor and Lake Erie to a point where the south city line extended intersects the waters of Buffalo Harbor, thence easterly and northerly along said city line extended and said city line to the place of beginning; together with the city of Lackawanna and the towns of Amherst, Clarence, Newstead, Lancaster, Alden, West Seneca, Elma, Marilla, Hamburg, Orchard Park, Aurora, Wales, Evans, Eden, Boston, Colden, Holland, Brant, North Collins, Collins, Concord and Sardinia; also that part of the Cattaraugus Indian Reservation and that part of the Tonawanda Indian Reservation within the county of Erie.

Fifty-eighth. The fifty-eighth senate district shall consist of the counties of Chautauqua and Cattaraugus. Added L.1953, c. 893; amended L.1954, c. 2, eff. Jan. 18, 1954; L.1954, c. 821, § 1, eff. June 10, 1954.

§ 122. Present assembly districts

The assembly districts of this state, as existing immediately before the enactment of this article, shall continue

to be the assembly districts of the state until the expiration of the terms of the members then in office, except for the purpose of an election of members of assembly for full terms beginning at such expirations and except for the election of delegates to a state or judicial district convention; members of a state committee, members of a county committee or any other party office or position, and any public office to be filled for a term or terms commencing on or after or to continue beyond January first, nineteen hundred fifty-five. Added L. 1953, c. 893; amended L. 1954, c. 821, § 2, eff. June 10, 1954.

§ 123. Apportionment of members of assembly

Except as provided in section one hundred twenty-two, the number of members of assembly of this state hereafter to be chosen in the several counties thereof shall be as follows:

In the county of Albany, two.
In the county of Allegany, one.
In the county of Bronx, twelve.
In the county of Broome, two.
In the county of Cattaraugus, one.
In the county of Cayuga, one.
In the county of Chautauqua, one.
In the county of Chemung, one.
In the county of Chenango, one.
In the county of Clinton, one.
In the county of Columbia, one.
In the county of Cortland, one.
In the county of Delaware, one.
In the county of Dutchess, one.
In the county of Erie, eight.
In the county of Essex, one.

In the county of Franklin, one.
In the counties of Fulton and Hamilton, one.
In the county of Genesee, one.
In the county of Greene, one.
In the county of Herkimer, one.
In the county of Jefferson, one.
In the county of Kings, twenty-two.
In the county of Lewis, one.
In the county of Livingston, one.
In the county of Madison, one.
In the county of Monroe, four.
In the county of Montgomery, one.
In the county of Nassau, six.
In the county of New York, sixteen.
In the county of Niagara, two.
In the county of Oneida, two.
In the county of Onondaga, three.
In the county of Ontario, one.
In the county of Orange, two.
In the county of Orleans, one.
In the county of Oswego, one.
In the county of Otsego, one.
In the county of Putnam, one.
In the county of Queens, thirteen.
In the county of Rensselaer, one.
In the county of Richmond, two.
In the county of Rockland, one.
In the county of St. Lawrence, one.
In the county of Saratoga, one.
In the county of Schenectady, one.
In the county of Schoharie, one.
In the county of Schuyler, one.
In the county of Seneca, one.
In the county of Steuben, one.

In the county of Suffolk, three.
In the county of Sullivan, one.
In the county of Tioga, one.
In the county of Tompkins, one.
In the county of Ulster, one.
In the county of Warren, one.
In the county of Washington, one.
In the county of Wayne, one.
In the county of Westchester, six.
In the county of Wyoming, one.
In the county of Yates, one.
Added L. 1953, c. 893, eff. Nov. 19, 1953.

§ 124. New assembly districts

The supervisors in each of the aforesaid counties, which are by the provisions of this article entitled to more than one member of assembly, shall meet on the fifteenth day of December nineteen hundred fifty-three, or on such other date as they shall determine but not later than the fifteenth day of March, nineteen hundred fifty-four at the place where their last meeting was held; organize by appointing one of their number as chairman and another as secretary; and proceed to divide such county into as many assembly districts as it is entitled to members of assembly. In any case where, prior to the effective date of this act, the supervisors of any such county have met on a date other than the fifteenth day of December, nineteen hundred fifty-three, organized and divided their county into assembly districts, all of the acts and proceedings of said supervisors in so meeting, organizing and dividing such county into assembly districts are hereby validated, ratified and confirmed.

In order to facilitate the division of such counties into assembly districts, there shall be made available to the

supervisors of such counties by the joint legislative committee on reapportionment created by the legislature by resolution adopted March twenty-ninth, nineteen hundred forty-nine and extended from time to time by resolutions duly adopted, information, data, statistics and maps in the possession of said joint legislative committee on reapportionment and pertinent to the division of such counties into assembly districts provided, however, that original maps prepared by the joint legislative committee on reapportionment and original data and statistics furnished the joint legislative committee on reapportionment by the United States bureau of the census shall at all times remain in the possession and under the control of the joint legislative committee on reapportionment. The accuracy of such information, data, statistics and maps shall be certified by the chairman of the joint legislative committee on reapportionment or by such member of said committee's staff as he may designate for that purpose.

The supervisors of each such county shall thereupon make a certificate in duplicate containing a description of each assembly district in the county, and specifying the number of each district and of the inhabitants thereof, excluding aliens, according to the nineteen hundred fifty federal census.

In any city comprising one or more counties in which there is no board of supervisors, the members of the council of said city shall constitute a board for the division of the counties in such city into assembly districts; meet at the same time and in the same manner organize; and make such divisions in said counties and certificates as boards of supervisors in other counties are required to do.

Each certificate shall be signed by a majority of such supervisors respectively, except in cities comprising one or more counties in which there is no board of supervisors, and in such cities by a majority of the council of each said city. The supervisors or councilmen shall cause duplicate certificates to be filed in the office of the secretary of state and in the office of the clerk of the respective counties.

In any case where, after the supervisors of a county or the members of the council of a city comprising one or more counties in which there is no board of supervisors have met but before they have completed the division of such county or counties into assembly districts, new supervisors or new members of the council of such city have been elected and have taken office, such new supervisors or new members of the council of such city shall meet, organize and shall complete the division of such county or counties into assembly districts and shall meet and sign the certificate or certificates as herein provided. Added L.1953, c. 893; amended L.1954, c. 497, eff. April 6, 1954.

APPENDIX C

Excerpts from the Record of Proceedings of the Constitutional Convention of 1894

The proceedings of the Constitutional Convention of 1894 which enacted the apportionment provisions challenged in this litigation disclose that a strong anti-urban bias substantially motivated the convention. For example, speaking in favor of the adoption of the apportionment formula, Delegate Cookinham stated:

> "Now, Mr. Chairman and gentlemen, I ask your attention just one moment to one more proposition, and I will have finished. It is this. I say without fear of contradiction, successful contradiction, that the average citizen in the rural district is superior in intelligence, superior in morality, superior in self-government, to the average citizen in the great cities. I say this not in disparagement of the excellent gentlemen who represent the great cities in this body. I know what the culture of the great cities is. But I know, furthermore, that the lower strata of society in the great cities is such that when the balance is struck, and the average citizen is produced, he is not a citizen so well worthy of confidence as the average citizen in the rural districts. The stream will never be purer than the fountain, and government is founded upon the average citizen and not the cultured and wealthy classes.
>
> If, then, the average citizen in the rural districts is a superior citizen to the average citizen of the great cities, your government will be better, your government will be safer in his hands than in the hands of the average citizen of the great cities. • • • I tell you, gentlemen, you who represent that great city, that when that time comes, when your streets are filled with those who defy the law, when

socialists, when those who believe in no government, are parading your streets and destroying your property and killing your citizens, then you will cry for help. And to whom? You will then turn your eyes to the green fields of Oneida and Herkimer and Jefferson and St. Lawrence. You will call to us, who have no Emma Goldburgs and no Herr Mosts, and you will expect us to respond to the call, and we will. For we have as much pride in that great city as you." (4 Revised Record of the N. Y. State Constitutional Convention (1894) pp. 10-11.)

Delegate Edward Lauterbach also urged that city dwellers were "unfit for citizenship" and that rural residents had "greater intellect." (Ibid. at p. 87.)

Protest was raised by Delegate Bush to the action which the majority of the convention was taking. Delegate Bush said:

"* * * In the beautiful scheme which is advocated here, and which the chairman has quoted decisions of the court in favor of, does he adopt that system of apportionment? Oh, no. That would give the cities their just dues. And it is openly stated by the majority of the committee that the purpose of the committee was to prevent the cities from getting the apportionment to which they were entitled and to give it to the country districts, and this work does it beautifully. * * * So that you see, under this beautiful scheme, which seeks nothing but fairness, that while 35,500 population elect a Republican Member of Assembly, it takes 40,566 to elect a Democratic Member of Assembly; and yet, there is nothing of the gerrymander about it, and it is put into the Constitution to prohibit wicked Legislatures from ever gerrymandering the State. * * * (3 Revised Record of the N. Y. State Constitutional Convention (1894) pp. 1008-1009.)

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 836

W.M.C.A., Inc., R. PETER STRAUS, JOSEPH De MAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

Appellants,

against

CAROLINE K. SIMON, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, ABE STARK, President of the City Council of the City of New York, A. HOLLY PATTERSON, Chairman, Board of Supervisors, Nassau County, OWEN M. QUINN, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Appellees.

On Appeal From the United States District Court
for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 836

W.M.C.A. INC., R. PETER STRAUS, JOSEPH DE MAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. MCCAFFERTY,

Appellants,

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CAROLINE K. SIMON, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, ABE STARK, President of the City Council of the City of New York, A. HOLLY PATTERSON, Chairman, Board of Supervisors, Nassau County, OWEN M. QUINN, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellees Attorney General and Secretary of State, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment

of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument, or, in the alternative, that this appeal be dismissed.

Statutes Involved

The relevant state constitutional and statutory provisions are set forth in Appendix B of appellants' jurisdictional statement. We summarize them here briefly for the convenience of the Court.

The system for apportioning seats, in both the State Senate and Assembly, is contained in N. Y. Const. Art. III, §§ 2-5. While more than one Senate or Assembly District can be contained within the whole of a single county, and while a given Senate district may consist of more than one county, no county border line can be broken in the formation of either type of district.

The total number of Assemblymen is fixed at 150, with every county except Hamilton (which shares one Assemblyman with Fulton County) entitled to one Assemblyman. Sixty-one seats are thus accounted for. The remaining 89 seats, however, are apportioned in this manner: The citizen population of the State is divided by the total number of Assemblymen, and the quotient thus achieved becomes the "ratio." Every county whose citizen population equals 1½ times the "ratio" is entitled to a second Assemblyman. The rest of the seats are then apportioned among those counties with citizen populations greater than twice the "ratio." Seats apportioned on remainders are apportioned in order of highest remainders, with the proviso that no county shall have more Assemblymen than a county with a larger citizen population.

The Senate districts are created primarily on the basis of citizen population. A "ratio" is determined by dividing the citizen population of the State by 50 (the number

of Senators); Senate districts are then formed by combining or dividing counties so that each district contains approximately this number (the "ratio") of citizens. The Constitution provides that each district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact a form as practicable. There are four further provisos: When any county is entitled to more than three Senators, the Senate is enlarged from its minimum size (50) by the number of these additional Senators; no county can have four or more Senators unless it has a full population ratio for each; no county shall have more than one third of all the Senators; and no two counties that are adjoining or separated by one public waterway shall have more than half of all the Senators.

The most recent redistricting pursuant to these provisions went into effect in 1954.

Statement of the Case

This is a class action brought under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 by the six individual appellants—residents of four of New York City's counties (Bronx, Kings, New York, Queens; the fifth, Richmond, is not represented), and Nassau and Suffolk Counties—and W.M.C.A., Inc., a New York corporation. Appellees are officials of State and local government who perform duties relating to election of state legislative representatives, in accordance with the State statutes. The complaint sought declaratory judgment that the formula contained in the State Constitution for apportioning legislative seats (Congressional districting is not here challenged) violates the Fourteenth Amendment and sought an injunction against further action by appellees pursuant to the challenged provisions.

Opinions Below

The three-judge District Court unanimously granted appellees' motions to dismiss the complaint. Each of the

three judges wrote a separate opinion. Judges RYAN and LEVET agreed that the Federal courts have jurisdiction to consider claims of malapportionment of state legislatures. They went on to consider the merits of the complaint; both agreed that a State could protect its less populous counties by guaranteeing them an adequate voice in the legislature (Jurisd. Statement, App. A, 21a, 28a). Thus, a majority of the Court decided that the complaint be dismissed—on the merits—for failure to state a claim.

Judge WATERMAN, concurring, thought that decisions of this Court prior to *Baker* v. *Carr*, 369 U. S. 186 (1962), made it mandatory to dismiss the complaint without considering its merits. Judge LEVET, in his opinion, noted his belief that the District Court's holding, dismissing the complaint on its merits, might be supplemented by an alternative holding that the relief sought was wanting in justiciability because of the difficulty of drafting a workable decree; this point was not dealt with by the other two members of the Court.

Argument

Appellants have advanced only one reason to show that this appeal raises substantial questions of public importance—they claim that the decision of the three-judge District Court, dismissing appellants' complaint for failure to state a claim, is contrary to this Court's holding in *Baker* v. *Carr*, 369 U. S. 186 (1962).

We submit that this contention is unfounded. The District Court held that it had jurisdiction to consider appellants' claim, and thus complied with the *Baker* decision. It then went on to consider the merits of the claim and held it insufficient under prior decisions of this Court, such as *MacDougall* v. *Green*, 335 U. S. 281 (1948), whose validity was most recently reiterated in *Baker*. The District Court holding, far from being inconsistent with any decision of

this Court, was in accordance with *MacDougall* and every other decision of this Court defining the scope of the equal protection clause.

There is no question involved in this appeal which has not been reduced to settled principle by these decisions.

(A)

We are compelled to begin with a restatement of this Court's holding in *Baker*, since appellants treat it as supporting their position in this appeal. In fact, this Court did not even adjudicate the merits of the Tennessee apportionment challenged in *Baker;* much less did it lend comfort to appellants' attack on New York State legislative apportionment. Carefully noting the distinction between dismissals for lack of jurisdiction and dismissals on the merits (30 U.S.L. Week at 4207), this Court limited its holding to the questions of jurisdiction and justiciability, and refused to discuss the merits of the *Baker* complaint.

In this context, it is bizarre to contend that the District Court's decision in this case is contrary to *Baker*. The District Court held that it had jurisdiction of the action, and went on to determine the merits; once having assumed jurisdiction, it satisfied the mandate later announced in the *Baker* decision. It is equally bizarre to suggest (Jurisd. Statement, pp. 10-11) that this appeal should be dealt with in the same manner as *Scholle* v. *Secretary of State*, 360 Mich. 1, 104 N. W. 2d 63 (1960), *vacated*, No. 22, October Term, 1961 (April 23, 1962). In *Scholle*, at least half of the Michigan Court refused to reach the merits of the action.

Unlike the "crazy quilt" apportionment attacked in *Baker* (CLARK, J., concurring, 30 U.S.L. Week at 4224), New York has a rational, consistently followed formula for allocating state legislative seats; this formula was held valid by the three-judge Court. It is significant that appellants show no conflict between the Court's dismissal of the

complaint on its merits, and the settled course of decisions by this Court under the Fourteenth Amendment. The reason is obvious; the dismissal was fully in line with the settled interpretation of the Fourteenth Amendment. It is for this reason that appellants dwell exclusively on the recent decision in *Baker*, although it lends no support whatsoever to their position.

(B)

If there was ever any doubt that previous cases had decided—on the merits—that a state may "assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses" (*MacDougall* v. *Green*, *supra* at 284) by granting the smaller counties somewhat greater representation in the state legislature than they would have if population were the only criterion for apportionment, this Court dispelled that doubt in its *Baker* opinion. That opinion (30 U.S.L. Week at 4208) pointed out that *MacDougall* v. *Green*, *supra*, affirmed on the merits Illinois' right to require that nominees for state-wide elections be supported by a petition signed by a minimum number of persons from at least 50 of the State's 102 counties.

In *MacDougall*, this Court stated that (335 U. S. at 283-84):

> "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this court, applying such broad Constitutional concepts as due process and equal protection of the laws, to deny a state the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have prac-

> tical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

Appellants' theory contrasts sharply with the classic statement of this Court in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79 (1911), lately re-emphasized in *Morey* v. *Doud*, 354 U. S. 457, 463-64 (1957):

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these:
>
> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
>
> 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
>
> 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

According to the 1960 census, the six counties represented by the six individual appellants had a population

of 9,526,948, or 56.8% of the total state population. They are represented by 72 Assemblymen and 28 Senators—48.0% of the Assembly and 48.3% of the Senate. Thus, the other 56 counties, with 43.2% of the State's population, have 52.0% of the total Assembly and 51.7% of the total Senate seats.

It cannot be argued seriously that this apportionment is without "reasonable basis." It is apparent, rather, that appellant relies on "mathematical nicety," despite this Court's clear rejection of such a test.

Two rationales for the New York legislative apportionment stand out. The first, fortified by this Court's holding in *MacDougall* v. *Green*, *supra*, is that it is reasonable to assure that the interests of the six counties involved in this appeal do not ride roughshod over the interests of the remaining 56 counties; as this Court pointed out, the thickly populated areas have myriad opportunities for exerting their political weight at the polls which are not available to the other counties—for example, in elections for statewide offices. Second, a legislator in a sparsely populated county, although he represents comparatively few people, represents a constituency that spans a relatively large geographical area.* Obviously the task of the up-state legislator is very different from that of the

---

*The six counties in which appellants reside contain 56.8% of the population of the State, but they constitute only 3.1% of its area. Four of them—Bronx, Kings, New York and Queens—make up, along with Richmond (not involved in this suit), New York City; these are the smallest counties in the State. The other two, Nassau and Suffolk, are part of New York City's metropolitan area. Nassau has the ninth smallest area of the state's 62 counties. Suffolk, alone of the six counties here represented, has a fairly large area; its "under-representation" in the legislature is explained not only by its identification with the metropolitan area but also by its sudden population growth—from 1950 to 1960, its population went up 141% as compared with a population rise of 13.2% for the state as a whole (Figures from decennial census of 1950 and 1960).

down-stater. It is certainly reasonable to take geography as well as population into account in apportioning legislative seats.

And the staunchest advocates of the *Baker* decision have recognized this. They have pointed out that

> "constitutional statecraft often involves a degree of protection for minorities which limits the principle of majority rule. Perfect numerical equality in voting rights would be achieved if an entire State legislature were elected at large but the danger is too great that the remote and less populated sections would be neglected or that, in the event of a conflict between two parts of the State, the more populous region would elect the entire legislature and in its councils the minority would never be heard." Amicus Brief for the United States, *Baker* v. *Carr*, pp. 29-30.

See also Lewis, "Legislative Apportionment and the Federal Courts," 71 Harv. L. Rev. 1057 n. 3 (1958).

Similarly, appellants' attempt (Jurisd. Statement, App. C) to psychoanalyze the 1894 Constitutional Convention falls wide of the mark. See *McGowan* v. *Maryland*, 366 U. S. 420, 425-26, 468-69 (1961); *Kotch* v. *Board of Pilot Comm'rs.*, 330 U. S. 552 (1947).

Thus, it is clear that the District Court's dismissal of this complaint was consistent with this Court's prior holdings under the Fourteenth Amendment and the subsequent *Baker* case. The questions raised by appellants are clearly not substantial.

(C)

Appellants also refer (Jurisd. Statement, p. 9) to an alternative holding proposed in Judge LEVET's opinion; he had concluded that the complaint should be dismissed not only because it failed to state a claim—the holding

of the Court—but also because it lacked equity or justiciability. This conclusion was of course not part of the District Court's holding since it was adopted by neither of the concurring judges. Thus, it fails to raise substantial questions worthy of consideration by this Court or of remand to the District Court.

CONCLUSION

This appeal presents no substantial questions of public importance. The United States District Court correctly determined the issues on the merits in accord with *Baker* v. *Carr* and other relevant decisions of this Court. Therefore, the judgment should be affirmed or the appeal dismissed.

Dated: New York, New York, April 25, 1962.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 836

W.M.C.A. INC.; R. PETER STRAUS; JOSEPH DE MAIO; EDWARD LIND; S. THOMAS DELANEY; EDWARD C. BROWN; JAMES J. McCAFFERTY,

Appellants,

against

CAROLINE K. SIMON, Secretary of State of the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; ABE STARK, President of the City Council of the City of New York; A. HOLLY PATTERSON, Chairman, Board of Supervisors, Nassau County; OWEN M. QUINN, Chairman, Board of Supervisors, Westchester County; WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County; DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections New York City,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF ABE STARK, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS AND THOMAS MALLEE, APPELLEES

April 27, 1962

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 836

W.M.C.A., INC., *et al.*,

Appellants,

v.

CAROLINE K. SIMON, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF ABE STARK, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS AND THOMAS MALLEE, APPELLEES

Plaintiffs below have appealed pursuant to 28 U.S.C. 1253, from a judgment of a three-judge District Court dismissing their complaint. The relief sought by plaintiffs was (1) a declaratory judgment that the constitutional and statutory provisions relating to the apportionment of New York Senate and Assembly districts (Constitution, Art. III, Secs. 2-5; State Law, Secs. 121, 123) violate the Fourteenth Amendment of the United States Constitution, and (2) a permanent injunction restraining the defendants from performing their official duties under the challenged enactments.

This brief is submitted by appellee Abe Stark, President of the Council of the City of New York and appellees

Denis J. Mahon, James Power, John R. Crews and Thomas Mallee, Commissioners of the Board of Elections of the City of New York, in support of the appellants' position that this Court has jurisdiction of the appeal.[1]

Statement

Appellees will not repeat the introductory portions of the Jurisdictional Statement filed by the appellants (pp. 2-5). They deem the matters set forth there to be a fair and accurate summary of the jurisdictional facts, the question presented and the allegations of the complaint.

After service of the summons and complaint these appellees filed an answer admitting the allegations of the complaint and asking that the relief prayed for in the complaint be granted (R. 41-42). The other appellees moved for judgment dismissing the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds (1) that the court lacked jurisdiction over the subject matter and (2) that the complaint did not state a claim upon which relief could be granted (R. 33-40, 173-178, 306-308).

The motions to dismiss were granted by the statutory court, composed of Circuit Judge STERRY WATERMAN, Chief District Judge SYLVESTER RYAN and District Judge RICHARD H. LEVET.

---

[1] Precedent for these appellees' position on this appeal may be found in *MacDougall* v. *Green*, 335 U. S. 281 (1948), where Governor Dwight H. Green of Illinois, a defendant in the action and appellee in this Court, argued in support of the appellants' contention that the election statute there involved violated the Fourteenth Amendment. For an outline of Governor Green's argument see the report of the case in 93 L. ed. 5-6.

The Opinions Below

(1)

Judge LEVET, whose opinion was the longest and may therefore be considered the principal of the three opinions rendered, rejected the movants' contention that the court did not have jurisdiction of the subject matter of the complaint (Jurisdictional Statement, Appendix A, pp. 5a-14a). He held, however, that the complaint fails to state a claim upon which relief can be granted (*ibid.*, p. 24a). He based this conclusion on the holding that the only restrictions on a state's legislative powers over the voting rights of its citizens are those stated in the Fifteenth and Nineteenth Amendments (*ibid.*, p. 19a). He also cited, as additional ground for dismissal, want of equity or of justiciability, based upon the fact that the malapportionment complained of is accomplished by statutory implementation of state constitutional provisions, as distinguished from a statutory malapportionment enacted in contravention of a state constitution (*ibid.*, p. 25a).

Judge WATERMAN, in a short concurring opinion (*ibid.*, pp. 26a-27a), held that the complaint should be dismissed "without reaching the merits" because the issues proffered by the complaint "are not meet for judicial determination", citing *Colegrove* v. *Green*, 328 U. S. 549 (1946).

Judge RYAN, also concurring, agreed with Judge LEVET that the Court had jurisdiction of the cause, which, he added, "should be exercised only in the most compelling circumstances." In his opinion compelling circumstances were confined to discrimination against a particular racial or religious group "in violation of the 15th Amendment or of any other specific injunction of the Constitution" and did not include "mere territorial discrimination" (Jurisdictional Statement, Appendix, pp. 27a-28a).

(2)

Judge LEVET prefaced his discussion of the sufficiency of the complaint with a compilation of the facts deemed admitted (*ibid.*, p. 14a), supplemented by "certain additional facts" of which he took judicial notice (*ibid.*, pp. 15a-16a). Among the latter, one purported fact is so tainted by a latent fallacy as to deprive it of any probative value.

The "fact" referred to is numbered 4 and reads as follows (*ibid.*, p. 16a):

> "New York City with a population of 7,781,984 or 46.0% of the state's population of 16,782,304, has 65 assemblymen or 43.3% of the total assembly, and 25 senators or 43.1% of the total number of senators, while the counties other than those in New York City, with 54.0% of the population, have 56.7% of the total assembly and 56.9% of the senate seats."

The fallacy consists in the Court's comparison between the City's present representation in the senate and assembly with the population figures of the City and State according to the 1960 census, whereas the present apportionment of senate and assembly seats was based on the 1950 census.

It is undeniable that, as the complaint alleges (R. 7), the present apportionment was enacted in 1953 (New York Laws of 1953, Chapter 893) following the decennial census of 1950. Nor will it be denied that no reapportionment statute has been enacted based on the 1960 census.

The following figures are taken from the Legislative Manual, New York 1961-1962 (referred to by Judge LEVET at p. 15a) at pages 1030-1031. In 1950 the population of New York State was 14,830,192 and of the five counties comprising the City of New York (Bronx, Kings, New York, Queens and Richmond), 7,891,957.

It is therefore submitted that, insofar as relevant, the fact of which the Court should have taken judicial notice is as follows:

> "New York City with a population of 7,891,957 or 53.2% of the state's population of 14,830,192 has 65 assemblymen or 43.3% of the total assembly and 25 senators or 43.1% of the total number of senators, while the counties other than those in New York City, with 46.8% of the population, have 56.7% of the total assembly and 56.9% of the senate seats."

As the complaint alleges (Par. 15, R.-10-11) and the census figures establish, an apportionment "pursuant to the discriminatory constitutional formula and based on the 1960 census figures would only continue or even aggravate the existing malapportionment."

The Question Presented Is Substantial

In the view of these appellees it is hardly necessary to argue that the decision of this Court in *Baker* v. *Carr*, 369 U. S. 186, 30 L W 4203, decided March 26, 1962, establishes the substantiality of the question presented in this case. In both actions the appellants, citizens and voters in their respective states, invoked the Equal Protection Clause of the Fourteenth Amendment to strike down apportionment laws alleged to result in "debasement"[2] of their votes. Both actions reached this Court at the same point in the litigation—dismissal by the statutory court, before joinder of issue, upon the ground that the complaint failed to state a claim upon which relief could be granted.

Judge WATERMAN's view that the complaint should be dismissed because it raised political questions not meet for

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[2] The word appears in both complaints. (Complaint, *Baker* v. *Carr*, quoted in 30 U. S. Law Week 4203; complaint, Par. 16, R. 11.)

judicial determination, citing *Colegrove* v. *Green*, 328 U. S. 549, was in effect rejected by Mr. Justice BRENNAN, writing for the Court (30 LW 4210):

> "We understand the District Court to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a 'political question' and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable 'political question'.
>
> • • • • • •
>
> Appellants' claim that they are being denied equal protection is justiciable and if 'discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.' *Snowden* v. *Hughes*, 321 U. S. 1, 11."

Here the discrimination is sufficiently shown in Pars. 12-18 of the complaint (R. 8-12), which, at this stage of the action, are deemed admitted. *Gomillion* v. *Lightfoot*, 364 U. S. 339, 341 (1960).

Judge LEVET's ruling (with which Judge RYAN agreed) that the only discriminations in the exercise of the electoral franchise of which the courts may take cognizance are those forbidden by the Fifteenth and Nineteenth Amendments has likewise been rejected by this Court in *Baker* v. *Carr*.

In a concurring opinion Mr. Justice DOUGLAS said (30 LW 4220):

> "Race, color, or previous condition of servitude are impermissible standards by reason of the Fifteenth Amendment, and that alone is sufficient to explain *Gomillion* v. *Lightfoot*, 364 U. S. 339. • • •
>
> Sex is another impermissible standard by reason of the Nineteenth Amendment.

> There is a third barrier to a State's freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment, the provision invoked here, and so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?".

The question posed by Mr. Justice DOUGLAS was answered by this Court (per BRENNAN, J.) as follows (30 L W 4218):

> "We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment."

Judge LEVET wrote that in *Baker* v. *Carr*, then *sub judice*, this Court would decide whether "the Tennessee voters under federal constitutional provisions have a right to federal enforcement of the Tennessee state constitutional apportionment provisions". The instant case, he said, involves "interference with the enforcement of state constitutional provisions" (Jurisdictional Statement, Appendix A, p. 25a).

It is noteworthy that all eight Justices of this Court who participated in deciding *Baker* v. *Carr* were in agreement that whether the state statute under attack violated the Tennessee constitution was of no consequence in determining whether it violated the Fourteenth Amendment.

Justice BRENNAN wrote (fn. 15, 30 L W 4205):

> "It is clear that appellants' federal constitutional claims rest exclusively on alleged violation of the Fourteenth Amendment.

• • • • • •

> Since we hold that appellants have—if it develops at trial that the facts support the allegations—a cognizable federal constitutional cause of action resting in no degree on rights guaranteed or putatively guaranteed by the Tennessee Constitution, we do not consider, let alone enforce rights under a State Constitution which go further than the protections of the Fourteenth Amendment."

In his dissenting opinion (with which Mr. Justice HARLAN concurred), Mr. Justice FRANKFURTER wrote (30 L W 4245):

> "It is settled that whatever federal consequences may derive from a discrimination worked by a state statute must be the same as if the same discrimination were written into the State's fundamental law."

Here the discrimination is alleged to result not only from the statutes (State Law, Secs. 120-123) but also from the provisions of the State Constitution (Art. III, Secs. 2-5), and the complaint seeks a judgment declaring the unconstitutionality of both enactments (R. 15). The fact that in *Baker* v. *Carr* the target of attack was a state statute, while here it is the state constitution and statute, does not detract from the similarity between, if not the identity of, both actions, for each is "a suit which seeks to interpose the Constitution against enforcement of a state policy" and it is of no moment whether "such policy is defined in a state constitution or in an ordinary statute." *Phillips* v. *United States*, 312 U. S. 246, 251 (1941), quoted in *A. F. of L.* v. *Watson*, 327 U. S. 582, 592 (1946).

The prohibitions of the Fourteenth Amendment against state action apply to all state action, whether executive,[3]

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[3] *Sterling* v. *Constantin*, 287 U. S. 378 (1932).

judicial,[4] by legislative enactment,[5] or by Constitutional enactment.[6]

In confirming the jurisdiction and duty of the courts to protect individual voting rights against discriminatory state action regardless of whether in the form of malapportionment or through other action, *Baker* v. *Carr* decided nothing new or novel. As Mr. Justice BRENNAN and the concurring opinions make crystal clear, this duty of enforcing the protections of the Constitution has always been a function of the courts under our system of government and the courts must perform that function.

The District Court failed to perform this function.

In *Scholle* v. *Hare*, No. 22, October, 1961 Term, plaintiffs appealed to this Court from a judgment of the Supreme Court of Michigan (360 Mich. 1, 104 N. W. 2d 63 [1960]), which dismissed a petition that challenged the constitutionality, vis-a-vis the Fourteenth Amendment, of state senatorial reapportionment provisions of the Michigan Constitution. On April 23, 1962 this Court, *upon the jurisdictional statement and appellees' motion to dismiss or affirm*, vacated the judgment of dismissal and remanded the cause to the Michigan courts "for further consideration in the light of *Baker* v. *Carr*, 369 U. S. 186". (30 L W 3332.)

Baker v. *Carr* and *Scholle* v. *Hare* do not merely establish that the Court has jurisdiction of this cause, but, it is submitted, those decisions warrant a summary vacatur of the judgment of dismissal and a remand to the District Court.

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[4] *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

[5] *Truax* v. *Raich*, 239 U. S. 33 (1915).

[6] *Gibson* v. *Board of Public Instruction*, 272 F. 2d 763 (5th Cir., 1959); *Scholle* v. *Hare*, 30 L W 3332, vacating judgment, 360 Mich. 1, 104 N. W. 2d 63 (1960).

CONCLUSION

Probable jurisdiction should be noted or, in the alternative, the judgment should be vacated and the cause remanded to the District Court for joinder of issue and trial.

April 27, 1962.

Respectfully submitted,

LEO A. LARKIN
Corporation Counsel
Attorney for Abe Stark, et al.
Appellees

BENJAMIN OFFNER,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1961

W.M.C.A., Inc., R. PETER STRAUS, JOSEPH DE MAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

Appellants,

v.

CAROLINE K. SIMON, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, ABE STARK, President of the City Council of the City of New York, A. HOLLY PATTERSON, Chairman, Board of Supervisors, Nassau County, OWEN M. QUINN, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 836

W.M.C.A., Inc., *et al.*,

Appellants,

v.

Caroline K. Simon, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

Appellees Attorney General and Secretary of State have moved to dismiss or affirm. Appellees Abe Stark, Denis J. Mahon, James Power, John R. Crews and Thomas Mallee and Appellee Eugene Nickerson (successor in office to Appellee A. Holly Patterson) have filed briefs supporting Appellants' position. Appellees Owen M. Quinn and William J. Leonard have not responded to Appellants' Jurisdictional Statement except that an appearance has been noted for Appellee Owen M. Quinn.

We respectfully submit that it is patently fallacious to contend, as have Appellees Attorney General and Secretary of State (Motion to Dismiss or Affirm, p. 5) that the court below satisfied the mandate later announced in *Baker* by reviewing the complaint on its merits. To the extent that the lower court passed upon the complaint, it

determined its sufficiency by applying an erroneous standard—*i.e.*, that the Fourteenth Amendment and the federal courts would afford no protection against malapportionment designed to discriminate against urban voters (Jurisd. St. 16a-17a, 28a). Appellees Attorney General and Secretary of State cannot sincerely be urging upon this Court that any cursory review of the sufficiency of a complaint—even a review under a basically erroneous standard—satisfies the mandate of the *Baker* case. Such a contention entirely substitutes form for substance and, if sustained, would effectively deprive Appellants of a valid hearing on the merits of their cause.

Conclusion

It is respectfully urged that this Court should reverse the decision below and remand the case for reconsideration in the light of *Baker* v. *Carr*, Cf., *Scholle* v. *Secretary of State*, 360 Mich. 1, vacated, No. 22, Oct. Term 1961 April 23, 1962).

Respectfully submitted,

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May 16, 1962.

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IN THE

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October Term, 1961

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Appellants,

v.

CAROLINE K. SIMON, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, ABE STARK, President of the City Council of the City of New York, EUGENE H. NICKERSON, Chairman, Board of Supervisors, Nassau County, OWEN M. QUINN, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

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W. M. C. A., INC., et al.,

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CAROLINE K. SIMON, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM

A. Holly Patterson, named appellee in the within proceeding, Chairman of the Board of Supervisors of the County of Nassau when so named, has been succeeded by election by Eugene H. Nickerson, now Chairman of the Board of Supervisors of the County of Nassau. The position taken by the former appellee in the lower court was in support of the conclusion reached by that court when it dismissed the complaint herein.

The purpose of this memorandum is to show respectfully to the Court the reasons why, after careful study

of applicable decisions, the present appellee, Eugene H. Nickerson, wishes to support appellants' position and request for jurisdiction of this Court in order that this matter may go to trial on the issues presented.

The Court's decision in *Baker* v. *Carr* (369 U. S. 186), on similar issues has held that similar facts involving state legislative apportionment, present a justiciable cause and when properly presented to an appropriate forum are entitled to determination and adjudication.

The complaint in this action proceeded upon the same jurisdictional basis as *Baker* v. *Carr* (*supra*), and the decision in the lower court in this case, holding the complaint failed to state a cause of action, was similar to the lower court's decision in *Baker* v. *Carr* (*supra*). It was rendered, of course, without benefit of this Court's decision in *Baker* v. *Carr* (*supra*). It is clearly contrary and unless the decision is set aside, will create confusion as to the importance of this Court's decision in *Baker* v. *Carr* (*supra*).

Here the lower court (16 Civ. 1559 at 276) determined that a distinction could be made between the Tennessee (*Baker*) case because of the right of the Tennessee voter for constitutional enforcement. A careful reading of the Supreme Court's decision in *Baker* v. *Carr* (*supra*), shows that this position has been disclaimed as a basis for finding whether or not a justiciable cause of action exists.

Whole areas of the most populated sections in the State of New York, particularly the urban and suburban territories, are stated to have been discriminated against by the New York State Constitution of 1894. While the passage of the Constitution by popular referendum may in circumstances constitute a defense to this action, it

does not furnish basis for the summary dismissal ordered by the lower court herein.

If the substantive position of the appellants is correct, it would appear there is no adequate political or electoral remedy for appellants nor, for that matter for the persons whom this appellee represents. Legislative malapportionment tends to frustrate the democratic process, and its abuses are self perpetuating and self generating. The case should be heard.

Judicial determination within the last twenty years has been an effective weapon in establishing equality of citizens under our laws.

In this major area of substantial and fundamental rights, by the very nature of the problem of state legislative malapportionment, the sole source of redress for deprivation of rights is by this appeal to this Court. Accordingly, Eugene H. Nickerson, Chairman, Board of Supervisors of Nassau County, joins the appellants in requesting jurisdiction by the Court and urges the necessity of a trial and full determination of the issues presented.

CONCLUSION

It is submitted that the Court has jurisdiction and should hear this appeal or, in its discretion, should reverse the decision below and remand this case for reconsideration in the light of *Baker* v. *Carr*.

Respectfully submitted,

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Attorney for Appellee, Eugene H. Nickerson.

DOUGLAS P. NULL,
Senior Deputy County Attorney,
Of Counsel.

April 24, 1962.